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PRESERVING PROSECUTORIAL INDEPENDENCE: IS THE DEPARTMENT OF JUSTICE POLITICIZING THE HIRING AND FIRING OF U.S. ATTORNEYS?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

WITNESSES

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

PRESERVING PROSECUTORIAL INDEPENDENCE: IS THE DEPARTMENT OF JUSTICE POLITICIZING THE HIRING AND FIRING OF U.S. ATTORNEYS?

TUESDAY, FEBRUARY 6, 2007

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 9:37 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Schumer, presiding.

Present: Senators Schumer, Feinstein, Feingold, Cardin, Whitehouse, Specter, Hatch, Sessions, and Cornyn.

OPENING STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Good morning and welcome to the first hearing of our Administrative Law and Courts Subcommittee, and we—oh, this is a full Committee hearing, I am just informed. Power has already gone to his head.

I am reminded of that old Woody Allen movie, remember? Anyway, we will save that for another time.

Anyway, I will give an opening statement. Then Senator Specter will, and any others who wish to give opening statements are welcome to do so.

Well, we are holding this hearing because many members of this Committee, including Chairman Leahy, who had hoped to be here but is speaking on the floor at this time, have become increasingly concerned about the administration of justice and the rule of law in this country.

I have observed, with increasing alarm, how politicized the Department of Justice has become.

I have watched, with growing worry, as the Department has increasingly based hiring on political affiliation, ignored the recommendations of career attorneys, focused on the promotion of political agendas, and failed to retain legions of talented career attorneys.

I have sat on this Committee for 8 years and, before that, on the House Judiciary Committee for 16.

During those combined 24 years of oversight over the Department of Justice—through seven presidential terms, including three Republican Presidents—I have never seen the Department more

politicized and pushed further away from its mission as an apolitical enforcer of the rule of law.

And now, it appears even the hiring and firing of our top Federal prosecutors has become infused and corrupted with political, rather than prudent, considerations. Or at least, there is a very strong appearance that this is so.

For 6 years, there has been little or no oversight of the Department of Justice on matters like these. Those days are now over.

There are many questions surrounding the firing of a slew of U.S. Attorneys. I am committed to getting to the bottom of those questions. If we do not get the documentary information that we seek, I will consider moving to subpoena that material, including performance evaluations and other documents.

If we do not get forthright answers to our questions, I will consider moving to subpoena one or more of the fired U.S. Attorneys so that the record is clear.

So, with that in mind, let me turn to the issue at the center of today's hearing. Once appointed, U.S. Attorneys, perhaps more than any other public servant, must be above politics and beyond reproach. They must be seen to enforce the rule of law without fear or favor. They have enormous discretionary power, and any doubt as to their impartiality and their duty to enforce the rule of law puts seeds of poison in our democracy.

When politics unduly infects the appointment and removal of U.S. Attorneys, what happens? Cases suffer. Confidence plummets. And corruption has a chance to take root.

And what has happened here over the last 7 weeks is nothing short of breathtaking.

Less than 2 months ago, seven or more U.S. Attorneys reportedly received an unwelcome Christmas present. As the Washington Post reports, those top Federal prosecutors were called and terminated on the same day.

The Attorney General and others have sought to deflect criticism by suggesting that these officials all had it coming because of poor performance, that U.S. Attorneys are routinely removed from office, and that this was only business as usual.

But what happened here does not sound like an orderly and natural replacement of underperforming prosecutors; it sounds more like a purge.

What happened here does not sound like business as usual; it appears more reminiscent of a different sort of Saturday Night Massacre.

Here is what the record shows: Several U.S. Attorneys were apparently fired with no real explanation. Several were seemingly removed merely to make way for political up- and-comers. One was fired in the midst of a successful and continuing investigation of lawmakers. Another was replaced with a pure partisan of limited prosecutorial experience, without Senate confirmation. And all of this, coincidentally, followed a legal change—slipped into the PATRIOT Act in the dead of night—which for the first time in our history gave the Attorney General the power to make indefinite interim appointments and to bypass the Senate altogether.

We have heard from prominent attorneys—including many Republicans—who confirm that these actions are unprecedented, unnerving, and unnecessary. Let me quote a few.

The former San Diego U.S. Attorney, Peter Nunez, who served under President Reagan, said, "[This] is like nothing I've ever seen before in 35-plus years." He went on to say that while the President has the authority to fire a U.S. Attorney for any reason, it is "extremely rare" unless there is an allegation of misconduct.

Another former U.S. Attorney and head of the National Association of Former U.S. Attorneys said members of his group were in "shock" over the purge, which "goes against all tradition."

The Attorney General, for his part, has flatly denied that politics has played any part in the firings. At a Judiciary Committee hearing last month he testified that: "I would never, ever make a change in a U.S. Attorney position for political reasons."

And yet, the recent purge of top Federal prosecutors reeks of politics. An honest look at the record reveals that something is rotten in Denmark.

In Nevada, where U.S. Attorney Daniel Bogden was reportedly fired, a Republican source told the press that "the decision to remove U.S. Attorneys...was part of a plan to 'give somebody else that experience'"—this is a quote—"to build up the back bench of Republicans by giving them high-profile jobs." That was in the Las Vegas Review-Journal on January 18th.

In New Mexico, where U.S. Attorney David Iglesias was reportedly fired, he has publicly stated that when he asked why he was asked to resign, he "wasn't given any answers."

In San Diego, where U.S. Attorney Carol Lam was reportedly fired, the top-ranking FBI official in San Diego said: "I guarantee politics is involved." And the former U.S. Attorney under President Reagan said, "It really is outrageous."

Ms. Lam, of course, was in the midst of a sweeping public investigation of "Duke" Cunningham and his co-conspirators, and her office has outstanding subpoenas to three House committees.

Was her firing a political retaliation? There is no way to know. But the Department of Justice should go out of its way to avoid even the appearance of impropriety. That is not too much to ask. And as I have said, the appearance here, given all the circumstances, is plain awful.

Finally, in Arkansas, where U.S. Attorney Bud Cummins was forced out, there is not a scintilla of evidence that he had any blemish on his record. In fact, he was well respected on both sides of the aisle and was in the middle of a number of important investigations.

His sin? Occupying a high-profile position that was being eyed by an ambitious acolyte of Karl Rove, who had minimal Federal prosecution experience, but was highly skilled at opposition research and partisan attacks for the Republican National Committee.

Among other things, I look forward to hearing the Deputy Attorney General explain to us this morning how and why a well-performing prosecutor in Arkansas was axed in favor of such a partisan warrior. What strings were pulled and what influence was brought to bear?

In June of 2006, when Karl Rove himself was still being investigated by a U.S. Attorney, was he brazenly leading the charge to oust a sitting U.S. Attorney and install his own former aide? We do not know, but maybe we can find out.

Now, I ask, is this really how we should be replacing U.S. Attorneys in the middle of a Presidential term?

No one doubts the President has the legal authority to do it, but can this build confidence in the Justice Department? Can this build confidence in the administration of justice?

[The prepared statement of Senator Schumer appears as a submission for the record.]

I yield to my colleague from Pennsylvania.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

I concur with Senator Schumer that the prosecuting attorney is obligated to function in a nonpolitical way. The prosecuting attorney is a quasi-judicial official. He is part judge and part advocate, and the power of investigation and indictment and prosecution in criminal courts is a tremendous power. And I know it very well because I was the district attorney of a big, tough city for 8 years and an assistant district attorney for 4 years before that. And the phrase in Philadelphia, perhaps generally, was that the district attorney has the keys to the jail in his pocket. Well, if you have the keys to the jail, that is a lot of power.

But let us focus on the facts as opposed to generalizations, and I and my colleagues on the Republican side of the aisle will cooperate in finding the facts, if the facts are present. But let's be cautious about the generalizations, which we heard a great many of in the Chairman's opening remarks. If a U.S. Attorney was fired in retaliation for what was done in the prosecution of former Congressman Cunningham, that is wrong. And that is wrong even though the President has the power to terminate U.S. Attorneys. But the U.S. Attorneys cannot function if they are going to be afraid of the consequences of a vigorous prosecution.

When Senator Schumer says that the provision was insert into the PATRIOT Act in the dead of night, he is wrong. That provision was in a conference report which was available for examination for some 3 months. The first I found out about the change in the PATRIOT Act occurred a few weeks ago when Senator Feinstein approached me on the floor and made a comment about two U.S. Attorneys who were replaced under the authority of the change in law in the PATRIOT Act which altered the way U.S. Attorneys are replaced. Prior to the PATRIOT Act, U.S. Attorneys were replaced by the Attorney General for 120 days and then appointments by the court, or the First Assistant succeeded to the position of U.S. Attorney. And the PATRIOT Act gave broader powers to the Attorney General to appoint replacement U.S. Attorneys.

I then contacted my very able chief counsel, Michael O'Neill, to find out exactly what had happened, and Mr. O'Neill advised me that the requested change had come from the Department of Justice; that it had been handled by Brett Tolman, who is now the U.S. Attorney for Utah; and that the change had been requested

by the Department of Justice because there had been difficulty with the replacement of a U.S. Attorney in South Dakota, where the court made a replacement which was not in accordance with the statute, had not been a prior Federal employee and did not qualify. And there was also concern because in a number of districts, the courts had questioned the propriety of their appointing power because of separation of powers. And as Mr. Tolman explained it to Mr. O'Neill, those were the reasons, and the provision was added to the PATRIOT Act and, as I say, was open for public inspection for more than 3 months while the conference report was not acted on.

If you will recall, Senator Schumer came to the floor on December 16th, said he had been disposed to vote for the PATRIOT Act, but had changed his mind when the New York Times disclosed the secret wiretap program, electronic surveillance.

May the record show that Senator Schumer is nodding in the affirmative. There is something we can agree on. In fact, we agree sometimes in addition. Well, the conference report was not acted on for months, and at that time this provision was subject to review.

Now, I read in the newspaper that, "The Chairman of the Judiciary Committee, Arlen Specter, slipped it in." And I take umbrage and offense to that. I did not slip it in, and I do not slip things in. That is not my practice. If there is some item which I have any idea is controversial, I tell everybody about it. That is what I do. So I found it offensive to have the report of my slipping it in, that is how it got into the bill.

Now, I have talked about the matter with Senator Feinstein, and I do agree that we ought to change it back to where it was before. She and I, I think, will be able to agree in the executive session on Thursday. And let's be candid about it. The atmosphere in Washington, D.C., is one of high-level suspicion. There is a lot of suspicion about the executive branch because of what has happened with signing statements, because of what has happened with the surveillance program. And there is no doubt, because it has been explicitly articulated—maybe "articulate" is a bad word these days—especially stated by ranking Department of Justice officials that they want to increase—executive branch officials that they want to increase executive power.

So we live in an atmosphere of high-level suspicion, and I want to see this inquiry pursued on the items that Senator Schumer has mentioned. I do not want to see a hearing and then go on to other business. I want to see it pursued in each one of these cases and see what actually went on, because there are very serious accusations that are made, and if they are true, there ought to be very, very substantial action taken in our oversight function. And if they are false, then the accused ought to be exonerated.

But the purpose of the hearing, which can be accomplished, I think, in short order, is to change the PATRIOT Act so that this item is not possible for abuse. And in that I concur with Senator Feinstein and Senator Leahy and Senator Schumer, and the pursuit of political use of the Department is something that I also will cooperate in eliminating, if, in fact, it is true.

Thank you, Mr. Chairman.

Senator SCHUMER. Thank you, Senator Specter.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman, for holding the hearing. I have to chair the Africa Subcommittee of the Foreign Relations Committee at 10 o'clock, and I was hoping to give an opening statement. But I am very pleased not only with your statement but, frankly, with Senator Specter's statement as well because it sounds to me like there is going to be a bipartisan effort to fix this. I also have strong feelings about what was done here, but it sounds like there is a genuine desire to resolve this. So in that spirit and in light of the fact that I have to go anyway, Mr. Chairman, I am just going to ask that my statement be put in the record.

Senator SCHUMER. Without objection.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Senator SCHUMER. Senator Hatch?

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman. I appreciate it. I have appreciated both of your statements, too. I do not agree fully with either statement.

First of all, the U.S. Attorneys serve at the pleasure of the President, whoever the President may be, whether it is a Democrat or Republican. You know, the Department of Justice has repeatedly and adamantly stated that U.S. Attorneys are never removed or encouraged to resign in an effort to retaliate against them or interfere with investigations. Now, this comes from a Department whose mission is to enforce the law and defend the interests of the United States. Now, are we supposed to believe and press their efforts when it comes to outstanding criminal cases and investigations which have made our country a safer place, but then claim that they are lying when they tell us about their commitment to appoint proper U.S. Attorneys? I personally believe that type of insinuation is completely reckless.

Now, if, in fact, there has been untoward political effort here, then I would want to find it out just like Senators Schumer and Specter have indicated here. As has been said many times, U.S. Attorneys serve at the pleasure of the President. I remember when President Clinton became President. He dismissed 93 U.S. Attorneys, if I recall it correctly, in 1 day. That was very upsetting to some of my colleagues on our side. But he had a right to do it. And, frankly, I do not think anybody should have said he did it purely for political reasons, although I do not think you can ever remove all politics from actions that the President takes.

The President can remove them for any reason or no reason whatsoever. That is the law, and it is very clear. The U.S. Code says that, "Each United States Attorney is subject to removal by the President." It does not say that the President has to give explanations. It does not say that the President has to get permission from Congress. And it does not say that the President needs to grant media interviews giving full analysis of his personal deci-

sions. Perhaps critics should seek to amend the Federal Code and require these types of restrictions on the President's authority, but I would be against that.

Finally, I want to point out that the legislation that we are talking about applies to whatever political party is in office. The law does not say that George Bush is the only President who can remove U.S. Attorneys. And the law does not say that Attorney Generals appointed by a Republican President have interim appointment authority. The statutes apply to whoever is in office, no matter what political party.

Now, I remember with regard to interim U.S. Attorneys that an interim appointed during the Clinton served for 8 years in Puerto Rico and was not removed.

Now, you know, I for one do not want judges appointing U.S. Attorneys before whom they have to appear. That is why we have the executive branch of Government.

Now, I will be interested if there is any evidence that impropriety has occurred or that politics has caused the removal of otherwise decent, honorable people. And I am talking about pure politics because, let's face it, whoever is President certainly is going to be—at least so far, either a Democrat or a Republican in these later years of our Republic.

So these are important issues that are being raised here, but as I understand it, we are talking about seven to nine U.S. Attorneys, some of whom—we will just have to see what people will have to say about it. But I am going to be very interested in the comments of everybody here today. It should be a very, very interesting hearing, but I would caution people to reserve your judgment. If there is an untoward impropriety, by gosh, we should come down very hard against it. But this is not abnormal for Presidents to remove U.S. Attorneys and replace them with interims. And there are all kinds of problems, even with that system as it has worked, because sometimes we in the Judiciary Committee do not move to confirmations like we should as well either.

So there are lots of things that you could find faults with, but let's be very, very careful before we start dumping this in the hands of Federal judges, most of whom I really admire regardless of their prior political beliefs.

Thank you, Mr. Chairman.

Senator SCHUMER. Thank you, Senator Hatch.

Senator Cardin had to leave. Senator Whitehouse, do you want to make an opening statement? No? Okay. Thank you for coming.

Our first witness—and I know he has a tight schedule; I appreciate him being here—this time is our hard-working friend from Arkansas, Senator Mark Pryor. Senator Pryor?

STATEMENT OF HON. MARK L. PRYOR, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator PRYOR. Mr. Chairman, thank you, and I also want to thank all the members of the Committee. I have come here today to talk about events that occurred regarding the appointment of the Interim U.S. Attorney for the Eastern District of Arkansas, which I believe raise serious—

Senator SCHUMER. Senator, If you could just pull the mike a little closer.

Senator PRYOR. I believe raise serious concerns over the administration's encroachment on the Senate's constitutional responsibilities. I am not only concerned about this matter as a Member of the Senate, but as a former practicing lawyer in Arkansas and former Attorney General of my State, I know the Arkansas Bar well, and all appointments that impact the legal and judicial arena in Arkansas are especially important to me.

Moreover, due to the events of the past Congress, I have given much thought as to what my role as a Senator should be regarding executive and judicial nominations. I believe the confirmation is as serious as anything that we do in Government.

You know my record. I have supported almost all of the President's nominations. On occasion, I have felt they were unfairly criticized for political purposes, for when I consider a nominee, I use a three-part test: First, is the nominee qualified? Second, does the nominee possess the proper temperament? Third, will the nominee be fair and impartial? In other words, can they check their political views at the door?

Executive branch nominees are different from judicial nominees in many ways, but U.S. Attorneys should be held to a high standard of independence. In other words, they are not inferior officers, as defined by the U.S. Supreme Court. All U.S. Attorneys must pursue justice. Wherever a case takes them, they should protect our Republic by seeing that justice is done. Politics has no place in the pursuit of justice.

This was my motivation in helping form the Gang of 14. I have tried very hard to be objective in my dealings with the President's nominations, including his nominations to the U.S. Supreme Court. I want the process to work in the best traditions of the Senate and in the best traditions of our democracy. In fact, I have been accused on more than one occasion of being overly fair to the President's nominations.

It is with this background that I state my belief that recent events relating to U.S. Attorney dismissals and replacements are unacceptable and should be unacceptable to all of us.

Now I would like to speak specifically about the facts that occurred regarding the U.S. Attorney replacement for the Eastern District of Arkansas.

In the summer of 2006, my office was told by reliable sources in the Arkansas legal and political community that then-U.S. Attorney Bud Cummins was resigning and the White House would nominate Mr. Tim Griffin as his replacement. I asked the reasons for Mr. Cummins's leaving and was informed that he was doing so to pursue other opportunities.

My office was later told by the administration that he was leaving on his own initiative and that Mr. Tim Griffin would be nominated. I did not know Mr. Griffin, but I spoke to him by telephone in August 2006 about his potential nomination. I told him that I know many lawyers in the State, but I knew very little about his legal background. In other words, I did not know if he was qualified or if he had the right temperament or if he could be fair and impartial. I informed him that I would have trouble supporting him

until the Judiciary Committee had reviewed these issues. I told him if he were to be nominated that I would evaluate my concerns in light of the Committee process.

It should be noted that around this time it was becoming clear that Mr. Cummins was being forced out, contrary to what my office had been told by the administration.

Some time after the interview with Mr. Griffin, I learned that there were newspaper accounts regarding his work on behalf of the Republican National Committee about efforts that have been categorized as "caging African-American votes." This arises from allegations that Mr. Griffin and others in the RNC were targeting African-Americans in Florida for voter challenges during the 2004 Presidential campaign.

I specifically addressed this issue to Mr. Griffin in a subsequent meeting. When I questioned him about this, he provided an account that was very different from the allegation. However, I informed him that due to the seriousness of the issue, this is precisely the reason why the nomination and confirmation process is in place. I told him I would not be comfortable until this Committee had thoroughly examined his background. Given my concerns over this potential nominee, I, as well as others, protested and Mr. Cummins was allowed to stay until the end of the year.

Rumors began to circulate in October of 2006 that the White House was going to make a recess appointment, which, of course, I found troubling. This rumor was persistent in the Arkansas legal and political community.

I called the White House on December 13, 2006, to express my concerns about a recess appointment and spoke to then-White House Counsel Harriet Miers. She told me that she would get back to me on this matter. I also called Attorney General Gonzales expressing my reservations, and he informed me that he would get back to me as well.

Despite expressing my concerns about a recess appointment to the White House and to the Attorney General, 2 days later, on December 15, 2006, Ms. Miers informed me that Mr. Griffin was their choice. Also on that same day, General Gonzales confirmed that he was going to appoint Mr. Griffin as an interim U.S. Attorney. Subsequently, my office inquired about the legal authority for the appointment and was informed it was pursuant to the amended statute in the PATRIOT Act.

Before I say any more, I need to tell the Committee that I respect and like General Gonzales. I supported his confirmation to be Attorney General. I have always found him to be a straight shooter. And even though I disagree with him on this decision, it has not changed my view of him. I suspect he is only doing what he has been told to do.

On December 20, 2006, Mr. Cummins's tenure as U.S. Attorney was over. On that same day, Mr. Griffin was appointed Interim U.S. Attorney for the Eastern District of Arkansas. The timing was controlled by the administration.

On January 11, 2007, I wrote a letter to General Gonzales outlining my objections with regard to this appointment. First, I made clear my concern as to how Mr. Cummins was summarily dismissed. Second, I outlined my amazement as to the excuse given

as the reason for the interim appointment, which was due to the First Assistant being on maternity leave. Third, I objected to the circumventing of the Senate confirmation process. The Attorney General's office responded on January 31, 2007, denying any discrimination or wrongdoing. I will address these issues now.

As more light was shed on the situation in Arkansas, it became clear that Bud Cummins was asked to resign without cause so that the White House could reward the Arkansas post to Mr. Griffin. Mr. Cummins confirmed this on January 13, 2007, in an article in the Arkansas Democrat Gazette newspaper wherein he said he had been asked to step down so that the White House could appoint another person. By all accounts, Mr. Cummins's performance has been fair, balanced, professional, and just. Lawyers on both sides of the political spectrum have nothing but positive things to say about Mr. Cummins's performance.

During his tenure, he established a highly successful Anti-Terrorism Advisory Council that brought together law enforcement at all levels for terrorism training. In the area of drug prosecutions, he continued the historic levels of quality, complex, and significant Organized Crime, Drug Enforcement Task Force drug prosecutions. He also increased Federal firearm prosecutions, pursued public corruption and cyber crime investigations that led to lengthy prison sentences for those convicted.

In addition, I understand that his performance evaluations were always exceptional. On this last point, I would ask the Committee to try to gather the service evaluations of Mr. Cummins and the other dismissed U.S. Attorneys to determine how they were perceived by the Justice Department as having performed their jobs.

The reason I am reciting Mr. Cummins's performance record is that it stands in stark contrast to General Gonzales' testimony before this Committee when he stated, "Some people should view it as a sign of good management. What we do is make an evaluation about the performance of individuals, and I have responsibility to the people in your districts that we have the best possible people in these positions. And that is the reason why changes sometimes have to be made. Although there are a number of reasons why changes get made and why people leave on their own, I think I would never, ever make a change in a United States Attorney position for political reasons or if it would in any way jeopardize an ongoing, serious investigation. I just would not do it."

The Attorney General then refused to say why Mr. Cummins was told to leave; however, it is my understanding that in other cases around the country, Justice Department officials have disclosed their reasoning for firing other U.S. Attorneys. The failure to acknowledge that Bud Cummins was told to leave for a purely political reason is a great disservice to someone who has been loyal to the administration and who performed his work admirably.

I have discussed in detail the events surrounding Mr. Cummins's dismissal. Now I would like to discuss the very troubling pretense for Mr. Griffin's appointment to Interim U.S. Attorney over the First Assistant U.S. Attorney in the Little Rock office.

The Justice Department advised me that normally the First Assistant U.S. Attorney is selected for the acting appointment while the White House sends their nominee through the Senate confirma-

tion process. This is based on 5 U.S.C. Section 3345(a)(1). However, in this case, the Justice Department confirmed that the First Assistant was passed over because she was on maternity leave. This was the reason given to my chief of staff as well as comments by the Justice Department spokesman Brian Roehrkasse—and I am not sure if I pronounced that name correctly—wherein he was quoted in newspapers as saying, "When the U.S. Attorney resigns, there is a need for someone to fill that position." He noted that, "Often the First Assistant U.S. Attorney in the affected district will serve as the Acting U.S. Attorney until the formal nomination process begins for a replacement. But in this case, the First Assistant is on maternity leave." That is what he said.

In addition, this reason was given to me specifically by a Justice Department liaison in a meeting in my office. In my letter to the Attorney General, I stated that while this may or may not be actionable in a public employment setting, it clearly would be in a private employment setting. Of all the agencies in the Federal Government, the Justice Department should not hold this view of pregnancy and motherhood in the workplace. I call this a pretense because it has become clear that Mr. Griffin was always the choice to replace Mr. Cummins.

Before I close, let me address the circumvention of the Senate's confirmation process. General Gonzales has said that it is his intention to nominate all U.S. Attorneys, but that does not hold water in Arkansas. For 7 months now, the administration has known of the departure of Mr. Cummins. Remember, they created his departure. It has now been 49 days since Bud Cummins was ousted without cause. If they were serious about the confirmation process, I cannot believe that it would have taken so long to nominate someone.

Now, to be fair, in my most recent telephone call with General Gonzales, he asked me whether I would support Tim Griffin as my nominee for this position. I have thought long and hard about this, and the answer is I cannot. If nominated, I would do everything I could to make sure he has an opportunity to tell his side of the story regarding all allegations and concerns to the Committee, and I would ask the Committee to give Mr. Griffin a vote as quickly as possible. It is impossible for me to say that I would never support his nomination because I do not know all the facts. That is why we have a process in the Senate.

I know I would never consider him as my nominee because I just know too many other lawyers who are more qualified, more experienced, and more respected by the Arkansas Bar. I will advise General Gonzales about this decision shortly.

Regardless of the situation in Arkansas, I am convinced that this should not happen again. I am also convinced that the administration and maybe future administrations will try to bypass the Senate unless we change this law. I do not say this lightly. Already, a challenge has been made to the appointment of Mr. Griffin in Arkansas as violating the U.S. Constitution because it bypassed Senate confirmation. While I have not reviewed the pleadings filed in this case—I believe it is a capital murder case. I do not know all the situation there. While I have not reviewed the pleadings there, I have read a recent article in the Arkansas Democrat Gazette that

concerns me. It is reported that, "Because United States Attorneys are inferior officers, the Appointments Clause of the Constitution expressly permits Congress to vest their appointments in the Attorney General and does not require the advice and consent of the Senate before they are appointed."

Please do not miss this point. The Justice Department has now pleaded in court that U.S. Attorneys as a matter of constitutional law are not subject to the advice and consent of the United States Senate.

After a thorough review by this Committee, I hope that you will reach the same conclusion I have, which is this: No administration should be able to appoint U.S. Attorneys without proper checks and balances. This is larger than party affiliation or any single appointment. This touches our solemn responsibility as Senators.

I hope this Committee will address it by voting for S. 214, which I join in offering along with Senators Feinstein and Leahy.

Thank you, Mr. Chairman.

Senator SCHUMER. Thank you very much, Senator Pryor, for your really outstanding testimony, and we will pursue many of the things you bring up.

I know that you have a busy schedule, and I would ask the indulgence of the Committee that if we have questions of Senator Pryor, we submit them in writing. Would that be okay?

Senator SPECTER. Well, Mr. Chairman, may I just ask one or two questions?

Senator PRYOR. Sure.

Senator SCHUMER. Thank you.

Senator SPECTER. Senator Pryor, do you think that Mr. Griffin is not qualified for the job?

Senator PRYOR. It is hard for me to say whether he is or isn't because I just know so little about his background. When I met with him, we talked about this, and I told him that it was my sincere hope that they nominate him so he could go through the process here. But it is impossible for me to say whether he is or is not because I know so little about him.

And just by way of background on him—and this is probably more detail than the Committee wants—he went to college in Arkansas and then he went off to Tulane Law School in Louisiana, and then more or less he did not come back to the State. I think he did maybe a year of practice in the U.S. Attorney's Office at some point. But basically his professional life has been mostly outside the State. So he has come back in, and the legal community just does not know him.

Senator SPECTER. Well, fair enough. You think it ought to be a matter for the Committee. I think that is the traditional way.

Senator PRYOR. Certainly.

Senator SPECTER. Did you think that his having worked for the Republican National Committee, RNC, or that he may be a protege of Karl Rove is relevant in any way as to his qualifications?

Senator PRYOR. To me it is not relevant. I think we call come to these various positions with different backgrounds, and certainly if someone works for a political committee or a politician or an administration, that does not concern me. Some of the activities that he may have been involved in do raise concerns. However, when I

talked to him about that, he offered an explanation, like I said, that was very different than the press accounts of what he did. And here, again, that takes me back to the process. That is why we have a process. Let him go through the Committee. Let you all and your staffs look at it. Let everybody evaluate that and see what the true facts are.

Senator SPECTER. Well, fair enough. The activities may bear, his conduct bears on his qualifications, but just the fact of working for the Republican National Committee and for Karl Rove is not a disqualifier.

Senator PRYOR. Not in my mind it is not.

Senator SPECTER. Thank you very much for coming in.

Senator PRYOR. We know how busy you are, and you have made a very comprehensive analysis, and it is very helpful to have a Senator appear substantively. So thank you.

Senator PRYOR. Thank you.

Senator SCHUMER. Thank you, Senator Pryor.

Any further questions?

[No response.]

Senator SCHUMER. Thank you so much.

Okay. Our next witness is the Honorable Paul J. McNulty. He is the Deputy Attorney General of the United States. He has spent almost his entire career as a public servant with more than two decades of experience in government at both the State and Federal levels. Just personally, Paul and I have known each other. When he served in the House, I knew him well. We worked together on the House Judiciary Committee. He is a man of great integrity. I have a great deal of faith in him and his personality and who he is and what he does. From 2001 to 2006, of course, he served as U.S. Attorney for the Eastern District of Virginia.

And now would you please stand, Deputy Attorney General McNulty, so that I may administer the oath of office? Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MCNULTY. I do.

Senator SCHUMER. Thank you. You may proceed with your statement.

STATEMENT OF PAUL J. MCNULTY, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. MCNULTY. Thank you, Mr. Chairman. Thank you for your kindness. I appreciate the opportunity to be here this morning and attempt to clear up the misunderstandings and misperceptions about the recent resignations of some U.S. Attorneys and to testify in strong opposition to S. 214, a bill which would strip the Attorney General of the authority to make interim appointments to fill vacant U.S. Attorney positions.

As you know and as you have said, Mr. Chairman, I had the privilege of serving as United States Attorney for 4–1/2 years. It was the best job I ever had. That is something you hear a lot from former United States Attorneys: "Best job I ever had." In my case, Mr. Chairman, it was even better than serving as counsel under your leadership with the Subcommittee on Crime.

Now, why is it being U.S. Attorney the best job? Why is it such a great job? There are a variety of reasons, but I think it boils down to this: The United States Attorneys are the President's chief legal representatives in the 94 Federal judicial district. In my former District of Eastern Virginia, Supreme Court Chief Justice John Marshall was the first United States Attorney. Being the President's chief legal representative means you are the face of the Department of Justice in your district. Every police chief you support, every victim you comfort, every citizen you inspire or encourage, and, yes, every criminal who is prosecuted in your name communicates to all of these people something significant about the priorities and values of both the President and the Attorney General.

At his Inauguration, the President raises his right hand and solemnly swears to faithfully execute the Office of the President of the United States. He fulfills this promise in no small measure through the men and women he appoints as United States Attorneys.

If the President and the Attorney General want to crack down on gun crimes, if they want to go after child pornographers and pedophiles, as this President and Attorney General have ordered Federal prosecutors to do, it is the United States Attorneys who have the privilege of making such priorities a reality. That is why it is the best job a lawyer can ever have. It is an incredible honor.

And this is why, Mr. Chairman, judges should not appoint United States Attorneys, as S. 214 proposes. What could be clearer executive branch responsibilities than the Attorney General's authority to temporary appoint and the President's opportunity to nominate for Senate confirmation those who will execute the President's duties of office? S. 214 does not even allow the Attorney General to make any interim appointments, contrary to the law prior to the most recent amendment.

The indisputable fact is that United States Attorneys serve at the pleasure of the President. They come and they go for lots of reasons. Of the United States Attorneys in my class at the beginning of this administration, more than half are now gone. Turnover is not unusual, and it rarely causes a problem, because even though the job of United States Attorney is extremely important, the greatest assets of any successful United States Attorney are the career men and women who serve as Assistant United States Attorneys: victim/witness coordinators, paralegals, legal assistants, and administrative personnel. Their experience and professionalism ensures smooth continuity as the job of U.S. Attorney transitions from one person to another.

Mr. Chairman, I conclude with these three promises to this Committee and the American people on behalf of the Attorney General and myself.

First, we never have and never will seek to remove a United States Attorney to interfere with an ongoing investigation or prosecution or in retaliation for a prosecution. Such an act is contrary to the most basic values of our system of justice, the proud legacy of the Department of Justice, and our integrity as public servants.

Second, in every single case where a United States Attorney position is vacant, the administration is committed to filling that position with a United States Attorney who is confirmed by the Senate.

The Attorney General's appointment authority has not and will not be used to circumvent the confirmation process. All accusations in this regard are contrary to the clear factual record. The statistics are laid out in my written statement.

And, third, through temporary appointments and nominations for Senate confirmation, the administration will continue to fill U.S. Attorney vacancies with men and women who are well qualified to assume the important duties of this office.

Mr. Chairman, if I thought the concerns you outlined in your opening statement were true, I would be disturbed, too. But these concerns are not based on facts, and the selection process we will discuss today I think will shed a great deal of light on that.

Finally, I have a lot of respect for you, Mr. Chairman, as you know. And when I hear you talk about the politicizing of the Department of Justice, it is like a knife in my heart. The AG and I love the Department, and it is an honor to serve. And we love its mission. And your perspective is completely contrary to my daily experience, and I would love the opportunity, not just today but in the weeks and months ahead, to dispel you of the opinion that you hold.

I appreciate your friendship and courtesy, and I am happy to respond to the Committee's questions.

[The prepared statement of Mr. McNulty appears as a submission for the record.]

Senator SCHUMER. Well, thank you, Deputy Attorney General. I very much appreciate your heartfelt comments. I can just tell you—and it is certainly not just me, but speaking for myself—what I have seen happen in the Justice Department is a knife to my heart as somebody who has followed and overseen the Justice Department for many, many years. And perhaps there are other explanations, but on issue after issue after issue after issue—I think Senator Specter alluded to it to some extent—the view that executive authority is paramount, to the extent that many of us feel congressional prerogatives written in law are either ignored or ways are found around them, I have never seen anything like it. And there are many fine public servants in the Justice Department. I had great respect for your predecessor, Mr. Comey. I have great respect for you. But you have to judge the performance of the Justice Department by what it does, not the quality of or how much you like the people in it.

And so my comment is not directed at you in particular, but it is directed at a Justice Department that seems to me to be far more politically harnessed than previous Justice Departments, whether they be under Democratic or Republican administrations.

There are a lot of questions, but I know some of my colleagues—I know my colleague from Rhode Island wants to ask questions and has other places to go, so I am going to limit the first round to 5 minutes for each of us. And then in the second round, we will go to more unlimited time, if it is just reasonable, if that is okay with you, Mr. Chairman. Okay.

First, you say in your testimony that a United States Attorney may be removed for any reason or no reason. So my first question is: Do you believe that U.S. Attorneys can be fired on simply a whim, somehow the President or the Attorney General wakes up

one morning and says, "Hmm, I don't like him, let's fire him"? What's the reason? "I just don't like him." Would that be okay?

Mr. MCNULTY. Well, Mr. Chairman—

Senator SCHUMER. Well, let me say, is that legally allowed?

Mr. MCNULTY. Well, if we are using just a very narrow question of can in a legal sense, I think the law is clear that "serving at the pleasure" would mean that there needs to be no specific basis.

Senator SCHUMER. Right. But I think you would agree that that would not be a good idea.

Mr. MCNULTY. I would agree.

Senator SCHUMER. Okay. Now, let me ask you this: You do agree that a United States Attorney cannot be removed for a discriminatory reason, because that person is a woman or black or—you would agree with that.

Mr. MCNULTY. Sure.

Senator SCHUMER. So there are some limits here.

Mr. MCNULTY. Well, of course, and there would certainly be moral limits, and I don't know the law in the area of removal as it relates to those special categories. But I certainly know that isn't an appropriate thing to do. It would be completely inappropriate.

Senator SCHUMER. Okay. And you do believe, of course, that a U.S. Attorney could be removed for a corrupt reason in return for a bribe or a favor.

Mr. MCNULTY. Right.

Senator SCHUMER. Okay. Now, let me ask you this: Do you think it is good for public confidence and respect of the Justice Department for the President to exercise his power to remove a U.S. Attorney simply to give somebody else a chance at the job? Let's just assume for the sake of argument that that is the reason. Mr. X, you are doing a very, very fine job, and you are in the middle of your term. No one objects to what you have done, but we prefer that Mr. Y take over. Would that be a good idea? Would that practice be wise?

Mr. MCNULTY. I think that if it was done on a large scale, it could raise substantial issues and concerns. But I don't have the same perhaps alarms that you might have about whether or not that is a bad practice.

If at the end of the first 4-year term—and, of course, all of our confirmation certificates say that we serve for a 4-year term. At the end of that 4-year term, if there was an effort to identify and nominate new individuals to step in, to take on the second term, for example, I am not so sure that would be contrary to the best interests of the Department of Justice. It is not something that has been done. It is not something that is being contemplated to do. But the turnover has already been essentially like that. We have already switched out more than half of the U.S. Attorneys that served in the first term. So change is not something that slows down or debilitates the work of the Department of Justice.

Senator SCHUMER. Right. And all of these—these seven that we are talking about—they had completed their 4-year terms, every one of them, but then had been in some length of holdover period. They were not all told immediately at the end or right before the end of their 4-year term to leave. Is that right?

Mr. MCNULTY. That is correct.

Senator SCHUMER. Okay. I still have a few minutes left, but I now have a whole new round of questioning, and I do not want to break it in the middle. So I am going to call on Senator Specter for his 5 minutes.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. McNulty, were you ever an Assistant U.S. Attorney?

Mr. MCNULTY. No, I wasn't.

Senator SPECTER. Well, I was interested in your comment that the best job you have had was U.S. Attorney, and that is probably because you were never an Assistant U.S. Attorney, because I was an assistant district attorney, and that is a much better job than district attorney.

Mr. MCNULTY. I have heard that from a lot of assistants. That is true.

Senator SPECTER. The assistant just gets to go into court and try cases and cross-examine witnesses and talk to juries and have a much higher level sport than administrators who are U.S. Attorneys or district attorneys.

Mr. McNulty, what about Carol Lam? I think we ought to get specific with the accusations that are made. Why was she terminated?

Mr. MCNULTY. Senator, I came here today to be as forthcoming as I possibly can, and I will continue to work with the Committee to provide information. But one thing that I do not want to do is, in a public setting, as the Attorney General declined to do, to discuss specific issues regarding people. I think that it is unfair to individuals to have a discussion like that in this setting in a public way, and I just have to respectfully decline going into specific reasons about any individual.

Senator SPECTER. Well, Mr. McNulty, I can understand your reluctance to do so, but when we have confirmation hearings, which is the converse of inquiries into termination, we go into very difficult matters.

Now, maybe somebody who is up for confirmation has more of an expectation of having critical comments made than someone who is terminated. And I am not going to press you as to a public matter, but I think the Committee needs to know why she was terminated. And if we can both find that out and have sufficient public assurance that the termination was justified, I am delighted—I am willing to do it that way.

I am not sure that these attorneys who were terminated would not prefer to have it in a public setting. But we have the same thing as to Mr. Cummins, and we have the same thing as to going into the qualifications of the people you have appointed. But to find out whether or not what Senator Schumer has had to say is right or wrong, we need to be specific.

Mr. MCNULTY. Could I make two comments?

First, on the question of the confirmation process, if you want to talk about me—and I am here to have an opportunity to respond to everything I have ever done—that is one thing. I just am reluctant to talk about somebody who is not here and who has the right to respond, and I don't—I just don't want to unfairly—

Senator SPECTER. But, Mr. McNulty, we are talking about you when we ask the question about why did you fire X or why did you fire Y. We are talking about what you did.

Mr. MCNULTY. And I will try to work with the Committee to give them as much information as possible. But I also want to say something else: Essentially we are here to stipulate to the fact that if the Committee is seeking information, our position basically is that there is going to be a range of reasons and we don't believe that we have an obligation to set forth a certain standard or reason or cause when it comes to removal.

Senator SPECTER. Are you saying that aside from not wanting to have comments about these individuals in a public setting—which, again, I say I am not pressing—that the Department of Justice is taking the position that you will not tell the Committee in our oversight capacity why you terminated these people?

Mr. MCNULTY. No, I am not saying that. I am saying something a little more complicated than that. What I am saying is that in searching through any document you might seek from the Department, such as every 3 years we do an evaluation of an office—those are called EARs reports. You may or may not see in an EAR report what would be concerned to a leadership of a department because that is just one way of measuring someone's performance. And much of this is subjective and will not be apparent in the form of some report that was done 2 or 3 years ago by a group of individuals that looked at an office.

Senator SPECTER. Well, my time is up, but we are going to go beyond reports. We are going to go to what the reasons were.

Mr. MCNULTY. Sure.

Senator SPECTER. Subjective reasons are understandable.

Mr. MCNULTY. I understand. I just—

Senator SPECTER. I like to observe that red signal. But you do not have to. You are the witness. Go ahead.

Mr. MCNULTY. The Senator opened, the Chairman opened with a reference to documentation, and I just wanted to make it clear that there really may or may not be documentation as you think of it because there aren't objective standards necessary in these matters when it comes to managing the Department and thinking through what is best for the future of the Department in terms of leadership of offices. In some places we may have some information that you can read. In others, we will have to just explain our thinking.

Senator SPECTER. We can understand oral testimony and subjective evaluations.

Mr. MCNULTY. Thank you, Senator.

Senator SPECTER. We do not function solely on documents.

Senator SCHUMER. Especially those of us who have been assistant district attorneys.

Senator SPECTER. That is the standard, Mr. McNulty so your qualifications are being challenged here. You have not been an Assistant U.S. Attorney.

Senator SCHUMER. The Senator from Rhode Island.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Mr. McNulty, welcome. You are clearly a very wonderful and impressive man, but it strikes me that your suggestions that there is

a clear, factual record about what happened and that this was just turnover are both just plain wrong.

I start from the clear, factual record. The suggestion has been made to the Washington Post and the Attorney General also made the same suggestion to us that—and I am quoting from the Post article on Sunday—"Each of the recently dismissed prosecutors had performance problems"—which does not jibe with the statement of Mr. Cummins from Arkansas that he was told there was nothing wrong with his performance, that officials in Washington wanted to give the job to another GOP loyalist.

So right from the very get-go we start with something that is clearly not a clear, factual record of what took place. In fact, on the very basic question of what the motivation was, we are getting two very distinct and irreconcilable stories. If it is true that, as the Washington Post reported, six of the prosecutors received calls notifying them of their firings on a single day, the suggestion that this is just ordinary turnover does not seem to pass the laugh test, really.

Could you respond to those two observations?

Mr. MCNULTY. Yes, sir. Thank you. Senator, first of all, with regard to Arkansas and what happened there and any other efforts to seek the resignation of U.S. Attorneys, these have been lumped together, but they really ought not to be. And we will talk about the Arkansas situation, as Senator Pryor has laid it out, and the fact is that there was a change made there that was not connected, as was said, to the performance of the incumbent, but more related to the opportunity to provide a fresh start with a new person in that position.

With regard to the other positions, however—

Senator WHITEHOUSE. But why would you need a fresh start if the first person was doing a perfectly good job?

Mr. MCNULTY. Well, again, in the discretion of the Department, individuals in the position of U.S. Attorneys serve at the pleasure of the President, and because turnover—and that is the only of going to your second question. I was referring to turnover. Because turnover is a common thing in U.S. Attorney's Offices—

Senator WHITEHOUSE. I know. I turned over myself as a U.S. Attorney.

Mr. MCNULTY. Bringing in someone does not create a disruption that is going to be hazardous to the office, and it does, again, provide some benefits. In the case of Arkansas, which this is really what we are talking about, the individual who was brought in had significant prosecution experience. He actually had more experience than Mr. Cummins did when he started the job. And so there was every reason to believe that he could be a good interim until his nomination or someone else who is nominated for that position went forward and there was a confirmed person in the job.

Senator WHITEHOUSE. Mr. McNulty, what value does it bring to the U.S. Attorney's Office in Arkansas to have the incoming U.S. Attorney have served as an aide to Karl Rove and to have served on the Republican National Committee?

Mr. MCNULTY. Well, all experience is—

Senator WHITEHOUSE. Has he learned anything useful there to being a U.S. Attorney?

Mr. MCNULTY. I don't know. All I know is that a lot of U.S. Attorneys have political backgrounds. Mr. Cummins ran for Congress as a Republican candidate. Mr. Cummins served in the Bush-Cheney campaign. I don't know if those experiences were useful for him to be a successful U.S. Attorney, because he was. I think a lot of U.S. Attorneys bring political experience to the job. It might help them in some intangible way.

But in the case of Mr. Griffin, he actually was in that district for a period of time serving as an Assistant United States Attorney, started their gun enforcement program, did many cases as a JAG prosecutor, went to Iraq, served this country there, and came back.

So there are lot of things about him that make him a credible and well-qualified person to be a U.S. Attorney.

Senator WHITEHOUSE. Having run public corruption cases and having firsthand experience of how difficult it is to get people to be willing to come in and testify and come forward, it is not an easy thing to do. You put your career, you put your relationships, everything on the line to come in and be a witness. If somebody in Arkansas were a witness to Republican political corruption, do you think it would have any effect on their willingness to come forward to have the new U.S. Attorney be somebody who assisted Karl Rove and worked for the Republican National Committee? Do you think it would give any reasonable hesitation or cause for concern on their part that maybe they should just keep this one to themselves until the air cleared?

Mr. MCNULTY. Well, again, U.S. Attorneys over a period of long history have had political backgrounds, and yet they still have been successful in doing public corruption cases. I think it says a lot about what U.S. Attorneys do when they get into office.

One thing, Senator, as you know as well as I do, public corruption cases are handled by career agents and career Assistant United States Attorneys that U.S. Attorneys play an important role, but there is a team that is involved in these cases. And that is a nice check on one person's opportunity to perhaps do something that might not be in the best interest of the case.

So my experience is that the political backgrounds of people create unpredictable situations. We have had plenty of Republicans prosecute Republicans in this administration, and we have had Democrats prosecute Democrats. Because once you put that hat on to be the chief prosecutor in the district, it transforms the way you look at the world.

Senator WHITEHOUSE. We hope.

Mr. MCNULTY. It certainly is done a lot.

Senator WHITEHOUSE. Mr. Chairman, is it clear that we will be receiving the EARS evaluations for these individuals?

Senator SCHUMER. We will get them one way or another, yes.

Senator WHITEHOUSE. Thank you.

Senator SCHUMER. Senator Hatch.

Senator HATCH. Well, first of all, Mr. McNulty, thanks for your testimony. I also concur with the Chairman that you are a great guy and you have served this country very, very well in a variety of positions.

Mr. MCNULTY. Thank you, Senator.

Senator HATCH. We all have great respect for you, having served up here in the Congress.

Are these really called "firings" down at the Department of Justice?

Mr. MCNULTY. No. The—

Senator HATCH. When people are removed?

Mr. MCNULTY. The terminology that has been assigned to these—"firings," "purges," and so forth—is, I think, unfair. Certainly the effort was made to encourage and seek people—

Senator HATCH. Well, basically my point is they are not being fired. You are replacing them with other people who may have the opportunity as well.

Mr. MCNULTY. Correct. And, Senator, one other thing I wanted to say is to Senator Whitehouse—

Senator HATCH. And that has been done by both Democrat and Republican administrations, right?

Mr. MCNULTY. Absolutely.

Senator HATCH. Is this the only administration that has replaced close to 50 percent of the U.S. Attorneys in its 6 years in office?

Mr. MCNULTY. I haven't done an analysis of—

Senator HATCH. But others have as well, haven't they?

Mr. MCNULTY. Well, it is a routine thing to see U.S. Attorneys come and go, as I have said.

Senator HATCH. Well, I pointed out at the beginning of this that President Clinton came in and requested the resignation of all 93 U.S. Attorneys. Are you aware of that?

Mr. MCNULTY. Yes, I am. I was, in fact—

Senator HATCH. I did not find any fault with that. That was his right.

Mr. MCNULTY. Right.

Senator HATCH. Because they serve at the pleasure of the President, right?

Mr. MCNULTY. Right.

Senator HATCH. Well, does the President always—or does the Department always have to have a reason for replacing a U.S. Attorney?

Mr. MCNULTY. They don't have to have cause. I think in responding to Senator Schumer's question earlier, I think—

Senator HATCH. They do not even have to have a reason. If they want to replace them, they have a right to do so. Is that right or is that wrong?

Mr. MCNULTY. They do not have to have one, no.

Senator HATCH. Well, that is my point. In other words, to try and imply that there is something wrong here bc certain U.S. Attorneys have been replaced is wrong unless you can show that there has been some real impropriety. If there is real impropriety, I would be the first to want to correct it.

Let me just ask you this: The primary reason given for last year's amendment of 28 U.S.C. 546 was the recurring—happened to be the recurring problems that resulted from the 120-day limitation on Attorney General appointments. Now, can you explain some of these problems and address the concerns of district courts that recognize the conflict in appointing an Interim U.S. Attorney?

Mr. MCNULTY. Senator, just prior to that change being made, as Senator Specter set forth in his opening statement, we had a very serious situation arise in South Dakota, and that situation illustrates what can happen when you have two authorities seeking to appoint a U.S. Attorney. In that case in South Dakota, the public defender's office actually challenged an indictment brought by the Interim U.S. Attorney claiming that he did not have the authority to indict someone because the judge there had appointed someone else to be the U.S. Attorney at about the same time. The individual that the judge appointed was somebody outside the Department of Justice, had not gone through a background check. We could not even communicate with that individual on classified information until a background check would have been done. And so it was a rather serious problem that we faced, and it lasted for a month or more.

There have been other problems like that over the history of the Department where someone comes in, perhaps, and has access to public corruption information who is completely outside of the Department of Justice—

Senator HATCH. Would you be willing to make a list of these type of problems?

Mr. MCNULTY. Well, we have been asked to do that in the questions that were submitted for the record at the AG's hearing.

Senator HATCH. I figured that, so if you will get that list to us so that we understand that these are not simple matters and that—you know, in your testimony you mentioned with great emphasis that the administration has at no time sought to avoid the Senate confirmation process by appointing an Interim United States Attorney and then refused to move forward in consultation with home-State Senators on the selection, nomination, and confirmation of a new United States Attorney.

Now, can you explain the role of the home-State Senator in this process and confirm that it has been done for the vacancies that have arisen since this law was amended?

Mr. MCNULTY. Thank you, Senator. We have had 15 nominations made since the law was amended. All 15 of those nominations could have been held back if we wanted to abuse this authority and just go ahead and put interims in. We have had 13 vacancies. All told, there have been about 23 situations where a nomination is necessary to go forward; 15 nominations have gone forward, and in the 8 where they haven't, we are currently in the process of consulting with the home-State Senators to send someone here.

And one thing, Senator, I have to say, because Senator Whitehouse referred to it, in the case of individuals who were called and asked to resign, not one situation have we had an interim yet appointed who falls into some category of a Washington person or an insider or something. In the cases where an interim has been appointed in those most recent situations, they both have been career persons from the office who are the interims, and we are working with the home-State Senators to identify the nominee who will be sent to this Committee for confirmation.

Senator HATCH. Thank you, Mr. Chairman.

Senator SCHUMER. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and thank you for holding these hearings.

Mr. McNulty, I believe it was in the 2006 reauthorization of the PATRIOT Act when this amendment was slipped into the law, and it was slipped into the law in a way that I do not believe anyone on this Committee knew that it was in the law. At least to my knowledge, no one has come forward and said, "Yes, we discussed this. I knew it was in the law." No Republican, no Democrat.

I would like to ask this question. Did you or any Justice staff make a series of phone calls in December to at least six United States Attorneys telling them they were to resign in January?

Mr. MCNULTY. I think I can say yes to that because—I don't want to talk about specific numbers, but phone calls were made in December asking U.S. Attorneys to resign. That is correct.

Senator FEINSTEIN. And how many U.S. Attorneys were asked to resign?

Mr. MCNULTY. Because of the privacy of individuals, I will say less than 10.

Senator FEINSTEIN. Okay, less than 10. And who were they?

Mr. MCNULTY. Senator, I would—following the Attorney General's response to this question at his Committee, in a public setting I don't want to mention the names of individuals. Not all names have necessarily been stated, or if they have, they have not been confirmed by the Department of Justice. And information like that can be provided to the Committee in a private setting, but in the public setting, I wish to not mention specific names.

Senator FEINSTEIN. And in a private session, you would be willing to give us the names of the people that were called in December?

Mr. MCNULTY. Yes.

Senator FEINSTEIN. Thank you very much.

Mr. Chairman, I think just by way of a—my own view is that the PATRIOT Act should not have been amended to change, and I know Senator Specter felt—I know Senator Specter feels that we should simply return the language to the way it was prior to the reauthorization in 2006, and I am agreeable to this. So I think we have found a solution that, in essence, would give the United States Attorney an opportunity to make a truly temporary appointment for a limited period of time, after which point, if no nominee has come up for confirmation or been confirmed, it would go to a judge. And I believe that we will mark that up tomorrow, and hopefully that would settle that matter.

In my heart of hearts, Mr. McNulty, I do believe—I could not prove in a court of law, but I do believe based on what I have heard that there was an effort made to essentially put in Interim U.S. Attorneys to give, as one person has said, "bright young people of our party, to put them in a position where they might be able to shine. That in itself I don't have an objection to. I think you are entitled to do that. But I think to use the U.S. Attorney spot for this is not the right thing to do. And that is why I think we need to put the law back the way it is.

Let me just ask one—

Mr. MCNULTY. Senator, may I just respond very briefly?

Senator FEINSTEIN. Sure, sure.

Mr. MCNULTY. And I respect your position on that. But I wanted to just make it clear that that premise has to be looked at in light of the process we go through to select the new U.S. Attorneys, because if that were the case, that we were doing this just to give sort of a group that had been pre-identified or something an opportunity to serve, it would not square with the process that exists in virtually every State in one way or another, to work with the home- State Senators to come up with the list of names of individuals.

In California, for example, as you know well because you led the way in which the system we have set up to identify qualified people, that has been a bipartisan process. It has worked very well. We respect that process. We will follow that process for vacancies that occur on California. So there won't be any way, any effort to try to force certain individuals into these positions since we go through a pre-established nomination, identification, and then confirmation process.

Senator FEINSTEIN. I appreciate that. Could I ask one last question? There are currently 13 vacancies, and this number does not include the recent additional 7 vacancies, like the ones in my State that have developed. Now, there are only two nominees pending before the United States Senate at this time. When do you intend to have the other nominees sent to us?

Mr. MCNULTY. I think we are higher than two out of the current vacancies—well, okay.

Senator FEINSTEIN. No, I—

Mr. MCNULTY. I will defer to your numbers on it.

Two is right. Sorry. We will make every effort possible to identify nominees to submit for your consideration here in the Committee. Sometimes the process takes a little longer because there is something going on in the home-State for a selection process. We move quickly when we receive names to have interviews, so we don't—the process doesn't get delayed there. But it is a complicated process to develop a final list in consultation and get them up here. But we are committed to doing that as quickly as possible for every vacancy we have.

Senator SCHUMER. Thank you.

Senator Specter wanted to say a brief word before Senator Feinstein left, and then we will go to Senator Sessions.

Senator SPECTER. Well, I just wanted to comment to Senator Feinstein that I thank her for her work on this issue. I had said before you arrived in my opening statement that I did not know of the change in the PATRIOT Act until you called it to my attention on the floor, and I said to you at that time, "This is news to me, but I will check it out." And I then checked it out with Mike O'Neill, who advised that Brett Tolman, a senior staff member, had gotten the request from the Department of Justice because of a situation in South Dakota where a judge made an appointment which was not in accordance with the statute. And there had been an issue arising with other courts questioning the separation of power.

But when you and I have discussed it further continuously, including yesterday, we came to the conclusion that we would send it back to the former statute, which I think will accommodate the purposes.

Senator FEINSTEIN. Thank you very much.

Senator SCHUMER. Senator Sessions.

Senator SESSIONS. Thank you. Senator Feinstein, I am troubled by the mushiness of our separation of powers and the constitutional concepts of executive branch and confirmation. And your proposal, I think it goes too far. I think the proposal that passed last time may need some reform.

I would be inclined to suggest, Mr. Chairman, that the reform needed may be to some sort of expedited or insured confirmation, submission and confirmation by the Senate, rather than having the executive branch, which constitutionally has not been ever considered a part of this process to be appointing U.S. Attorneys, but whatever.

You know, I don't know how I got to be United States Attorney. I see Senator Whitehouse. Maybe they thought he would be a bright, young star one day if they appointed him United States Attorney. I recall Rudy Giuliani and there was a dispute over his successor when he was United States Attorney in Manhattan, and he said he thought it would be nice if whoever were appointed was able to contribute to the discussion every now and then.

We do have U.S. Attorneys that preside over a lot of important discussions, and they generally put their name on the indictments of important cases. At least they are responsible whether they sign the indictment or not. So it is a very significant position, and it is difficult sometimes to anticipate who would be good at it and who would not. Some people without much experience do pretty well. Some with experience don't do very well at all.

We had a situation in Alabama that wasn't going very well. The Department of Justice recently made a change in the office, and it was reported as being for performance reasons. You filled the interim appointment with now U.S. Attorney Deborah Rhodes, a professional from San Diego, a professional prosecutor, who had been in the Department of Justice. She was sent in to bring the office together, did a good job of it. Senator Shelby and I recommended that she be made the permanent United States Attorney and we did that.

My personal view is that the Department of Justice is far too reticent in removing United States Attorneys that do not perform. United States Attorneys are a part of the executive branch. They have very important responsibilities.

I recall seeing an article recently about the wonderful Secretary of Labor Elaine Chao. She is the last member of the Cabinet standing, was part of the article. Cabinet members turn over. They are appointed and confirmed by the Senate at the pleasure of the President, and I think the Department of Justice has a responsibility of the 92 United States Attorneys to see that they perform to high standards, and if they do not so perform, to remove them. I don't see anything wrong with giving an opportunity to somebody who has got a lot of drive and energy and ability and letting them be United States Attorney and seeing how they perform. But they ought to have certain basic skills, in my view, that indicate they are going to be successful at it. Otherwise, you as the President gets judged on ineffectual appointments and failing to be effective in law enforcement and related issues. I just wanted to say that.

Seven out of 92 to be asked to step down is not that big a deal to me. I knew when I took the job that I was subject to being removed at any time without cause, just like the Secretary of State who does not have the confidence of the President or the Secretary of Transportation. If somebody had called and said, "Jeff, we would like you gone," you say, "Yes, sir," and move on, I think, and not be whining about it. You took the job with full knowledge of what it is all about.

With regard to one—I know you do not want to comment about these individual United States Attorneys and what complaints or performance problems or personal problems or morale problems within the office may have existed. I would just note that one has been fairly public. Carol Lam has been the subject of quite a number of complaints. Have you received complaints from Members of Congress about the performance of U.S. Attorney Carol Lam in San Diego on the California border?

Mr. MCNULTY. Well, we have received letters from Members of Congress. I don't want to go into the substance of them, although the Members can speak for them. But, again, I want to be very careful about what I say concerning any particular person.

Senator SESSIONS. Well, on July 30th, 14 House Members expressed concerns with the Department of Justice's current policy of not prosecuting alien smugglers—I do not mean people who come across the border; I mean those who smuggle groups of them across the border—specifically mentioning that Lam's office had declined to prosecute one key smuggler. Are you familiar with that—June 30, 2004?

Mr. MCNULTY. I am familiar with the letter.

Senator SESSIONS. On September 23, 2004, 19 House Members described the need for the prosecution of illegal alien smugglers—these are coyotes—in the border U.S. Attorney Offices, and they specifically mentioned the United States Attorney in San Diego. This is what they said: "Illustrating the problem, the United States Attorney's Office in San Diego stated that it is forced to limit prosecution to only the worst coyote offenders, leaving countless bad actors to go free."

Isn't that a letter you received that said that?

Mr. MCNULTY. I am familiar with the letter.

Senator SESSIONS. On October 13, 2005, Congressman Darrell Issa wrote to U.S. Attorney Lam complaining, saying this: "Your office has established an appalling record of refusal to prosecute even the worst criminal alien offenders." And then on October 20, 2005, 19 House Members wrote to Attorney General Gonzales to express their frustration, saying, "The U.S. Attorney in San Diego has stated that the office will not prosecute a criminal alien unless they have previously been convicted of two felones in the district"—two felonies in the district—before they would even prosecute.

Do you see a concern there? Is that something that the Attorney General the President have to consider when they decide who the U.S. Attorneys are?

Mr. MCNULTY. Well, anytime Members of Congress, Senators or House Members, write letters to us, we take them seriously and give them the consideration that is appropriate.

Senator SCHUMER. Thank you, Mr. McNulty. We will have a second round, if you want to pursue it, Senator Sessions.

Okay. I am going to go into my second round, and I want to go back to Bud Cummins.

First, Bud Cummins has said that he was told he had done nothing wrong and he was simply being asked to resign to let someone else have the job. Does he have it right?

Mr. MCNULTY. I accept that as being accurate, as best I know the facts.

Senator SCHUMER. Okay. So, in other words, Bud Cummins was fired for no reason, there was no cause?

Mr. MCNULTY. No cause provided in his case that I am aware of.

Senator SCHUMER. None at all. And was there anything materially negative in his evaluations, in his EARS reports or anything like that? From the reports that everyone has received, he had done an outstanding job, had gotten good evaluations. Do you believe that to be true?

Mr. MCNULTY. I don't know of anything that is negative, and I haven't seen his reports or—there was probably only one that was done during his tenure, but I haven't seen it. But I am not aware of anything that—

Senator SCHUMER. Would you be willing to submit those reports to us even if we would not make them public?

Mr. MCNULTY. Right, well, other than—I just want to fall short of making a firm promise right now, but we know that you are interested in them, and we want to work with you to see how we can accommodate your needs.

Senator SCHUMER. So your inclination is to do it, but you do not want to give a commitment right here.

Mr. MCNULTY. Correct.

Senator SCHUMER. Okay. As I said in my opening statement, if we cannot get them, I will certainly discuss with the Chairman my view that we should subpoena them if we cannot get them. This is a serious matter. I do not think they should be subpoenaed. I think we should get them. Certainly a report like this, which is a positive evaluation, your reasoning there, at least as far as Cummins is concerned—obviously, you can make imputations if others are not released—is it would not hurt his reputation in any way.

Mr. MCNULTY. I would just say, Mr. Chairman, if you get a report, if you see a report, and it does not show something that you believe is cause, to me that is not an "Aha" moment because, as I say right up front, those reports are written by peers.

Senator SCHUMER. Understood.

Mr. MCNULTY. And they may or may not contain views that are a concern to us.

Senator SCHUMER. But you did say earlier—and this is the first we have heard of this—that he was not fired for a particular reason. When he said he was being fired simply to let someone else have a shot at the job, that is accurate, as best you can tell.

Mr. MCNULTY. I am not disputing that characterization.

Senator SCHUMER. Okay. That is important to know.

Now, so then we go on to the replacement for Mr. Cummins, and, again, as Senator Feinstein and others have said, there are all kinds of reasons people are chosen to be U.S. Attorneys. But I first want to ask about this: Senator Pryor talked about allegations—I think they were in the press, he mentioned—about his successor, Mr. Griffin, "being involved in caging black votes."

First, if there were such an involvement, if he did do that at some point in his job, in one of his previous jobs, do you think that should be a disqualifier for him being U.S. Attorney in a State like Arkansas where there are obviously civil rights suits?

Mr. MCNULTY. I think any allegation or issue that is raised against somebody has to be carefully examined, and it goes into the thinking as to whether or not that person is the best candidate for the job.

Senator SCHUMER. Was Mr. Griffin given a thorough, thorough review before he was asked to do this job? And are you aware of anything that said he was involved in "caging black votes"?

Mr. MCNULTY. First of all, in terms of the kind of review, there are different levels of review, depending upon what a person is going to be doing. If you are an interim, you are already, by definition, in the Department of Justice in one way or another, either in the office or in the Criminal Division or some other place. You already have a background check. You are already serving the American people at the Department of Justice. And so you may—at that point, that has been sufficient, historically, to serve as an interim.

Then there is a background check for purposes of nomination. That brings in more information. We look at the background check carefully and decide based upon that whether or not it is appropriate to recommend to the President to nominate somebody.

Senator SCHUMER. So I have two questions. Would such a background check have come up with the fact that he was involved in "caging black votes," if that were the fact?

Mr. MCNULTY. Presumably. I am not an expert on how the background check process works entirely, but I think they go out and look at press clippings and other things. They go interview people. Maybe something comes up that relates to a person's activities—I am pretty sure things come up relating to a person's activities apart from—

Senator SCHUMER. But let me get—

Mr. MCNULTY.—what they have done in the office

Senator SCHUMER. If he was involved in such an activity, would it be your view, would you recommend to the Attorney General that Mr. Griffin not become the U.S. Attorney for Arkansas, if he were involved? And that is a big assumption. I admit it is just something that Senator Pryor mentioned. I think that was mentioned in a newspaper article.

Mr. MCNULTY. And I do not want to sound like I am quibbling. It is just that all I know here is that we have an article. Even Senator Pryor said that the explanation given was very different from what the article was. I don't know anything about it personally.

Senator SCHUMER. Right.

Mr. MCNULTY. And so I am—I don't want to say that if I knew some article was true, that that would, I would have no—

Senator SCHUMER. I did not ask about the article. If he was doing something that would prevent black people from voting—

Mr. MCNULTY. Of course. Well, if that is what it comes down to after all the facts are in—

Senator SCHUMER. Even if that was a legal political activity.

Mr. MCNULTY. That sounds like a very significant problem.

Senator SCHUMER. Okay. All right. Now, second, I just want to get this one, too, in Senator Pryor's testimony. Again, there were allegations that the First Assistant was passed over because of maternity leave. I believe she said that? Okay. You dispute that?

Mr. MCNULTY. No. It is just that in my briefings on what occurred, there is definitely some factual difference as to whether or not that really was a factor or not. It shouldn't be a factor, and, therefore, I have been told—

Senator SCHUMER. What if it was? What if it was a factor?

Mr. MCNULTY. I have been told—I am sorry?

Senator SCHUMER. What if it was a factor? I mean, she said it. She is a person of a degree of integrity. She was the First Assistant in an important office, and she is saying she was told she was passed over because of maternity leave. I would have to check with my legal eagles, but that might actually be prohibited under Federal law.

Mr. MCNULTY. I don't know, but—

Senator SCHUMER. I think that is probably true.

Mr. MCNULTY. It should not be a factor in consideration of whether or not she would serve as the interim, but I don't know if that—

Senator SCHUMER. Can you—

Mr. MCNULTY.—is accurate.

Senator SCHUMER. Again, if you choose to—I don't see any reason to do this in private because this does not—the reason you gave of not wanting to mention the EARS reports or others is you don't want to do any harm to the people who were removed. But would you be willing to come back to us and give us an evaluation as to whether that comment was true and whether she was passed over because of maternity leave? Could you come back to the Committee and report to that?

Mr. MCNULTY. Yes, I mean, at this point I can that, to the best of my knowledge, that is not the case. And, in fact, Mr. Griffin was identified as the person who would become the interim and possibly become the nominee before the knowledge of her circumstances was even known.

Senator SCHUMER. Again, I would ask that you come back and give us a report in writing as to why what she is saying is not true or is a misinterpretation. Okay?

Mr. MCNULTY. Okay.

Senator SCHUMER. All right. Now, let me ask you this:

You admitted—and I am glad you did—that Bud Cummins was fired for no reason. Were any of the other six U.S. Attorneys who were asked to step down fired for no reason as well?

Mr. MCNULTY. As the Attorney General said at his oversight hearing last month, the phone calls that were made back in December were performance related.

Senator SCHUMER. All the others?

Mr. MCNULTY. Yes.

Senator SCHUMER. But Bud Cummins was not one of those calls because he had been notified earlier.

Mr. MCNULTY. Right. He was notified in June of 2006.

Senator SCHUMER. So there was a reason to remove all the other six.

Mr. MCNULTY. Correct.

Senator SCHUMER. Okay. Let me ask you this—I want to go back to Bud Cummins here. So here we have the Attorney General adamant—here is his quote: "We would never, ever make a change in the U.S. Attorney position for political reasons." Then we have now, for the first time we learn that Bud Cummins was asked to leave for no reason, and we are putting in someone who has all kinds of political connections, not disqualifiers, obviously, certainly not legally, and I am sure it has been done by other administrations as well. But do you believe that firing a well-performing U.S. Attorney to make way for a political operative is not a political reason?

Mr. MCNULTY. Yes, I believe that it is not a political reason.

Senator SCHUMER. Okay. Could you try to explain yourself there?

Mr. MCNULTY. I will do my best. I think that the fact that he had political activities in his background does not speak to the question of his qualifications for being the United States Attorney in that district. I think an honest look at his resume shows that while it may not be the thickest when it comes to prosecution experience, it is not insignificant either. He had been Assistant United States Attorney in that district who set up their Project Safe Neighborhoods program. He had done a lot—

Senator SCHUMER. For how long had he been there?

Mr. MCNULTY. I think that was about a year or so.

Senator SCHUMER. I think it was less than that, a little less than that.

Mr. MCNULTY. But he did a number of gun cases in that period of time. He has also done a lot of trials as a JAG attorney. He had gone and served his country over in Iraq. He came back from Iraq, and he is looking for a new opportunity. Again, he had qualification that exceed what Mr. Cummins had when he started, what Ms. Casey had, who was the Clinton U.S. Attorney in that district before she became U.S. Attorney.

So you start off with a strong enough resume, and the fact that he was given an opportunity to step in. And there is one more piece of this that is a little tricky because you don't want to get in this business of what did Mr. Cummins say here or there, because I think we should talk to him. But he may have already been thinking about leaving at some point anyway. There are some press reports where he says that.

Now, I don't know—and I don't want to put words in his mouth. I don't know what the facts are there completely. What I have been told is that there was some indication that he was thinking about this as a time for his leaving the office or in some window of time. And all those things came together to say in this case, this unique situation, we can make a change, and this would still be good for the office.

Senator SCHUMER. So you can say to me that you believe—you put in your testimony you want somebody who is the best person possible.

Mr. MCNULTY. Well, I didn't—

Senator SCHUMER. Do you think Mr. Griffin is the best person possible? I cannot even see how Mr. Griffin would be better qualified in any way than Bud Cummins, who had done a good job, who was well respected, who had now had years of experience. There is somebody who served a limited number of months on a particular kind of case and had all kinds of other connections. It sure does not pass the smell test. I do not know what happened, and I cannot—you know, we will try to get to the bottom of that, and I have more questions. But—

Mr. MCNULTY. I did not say "best person possible." If I used that as a standard, I would not—

Senator SCHUMER. You did.

Mr. MCNULTY.—have become U.S. Attorney. I said "well qualified."

Senator SCHUMER. Okay.

Mr. MCNULTY. And those words were purposely chosen to say that he met the standards that are sufficient to take a job like that, and I have no hesitancy of that.

Senator SCHUMER. I just want to—I do not want to pick here with my friend Paul McNulty—quote from your testimony: "For these reasons, the Department is committed to having the best person possible discharging the responsibilities of that office at all times in every district."

I find it hard to believe that Tim Griffin was the best person possible. I find it hard to believe that anyone who did an independent evaluation in the Justice Department thought that Tim Griffin was a superior choice to Bud Cummins.

Mr. MCNULTY. I guess I was referring to my opening statement today—

Senator SCHUMER. Yes, okay.

Mr. MCNULTY.—when I said about "well qualified."

Senator SCHUMER. Let me ask you this: Can you give us some information how it came to be that Tim Griffin got his interim appointment? Who recommended him? Was it someone within the U.S. Attorney's Office in Arkansas? Was it someone from within the Justice Department?

Mr. MCNULTY. I don't know the answers to those questions.

Senator SCHUMER. Could you get us answers to that in writing? And I would also like to ask the question: Did anyone from outside the Justice Department, including Karl Rove, recommend Mr. Griffin for the job? Again, I am not saying there is anything illegal about that, but I think we ought to know.

Mr. MCNULTY. Okay.

Senator SCHUMER. Okay. But you don't have any knowledge of this right now?

Mr. MCNULTY. I don't.

Senator SCHUMER. Okay. Again, when Bud Cummins was told in the summer of 2006 that he was to leave, did those who told him have the idea of a replacement in mind?

Mr. MCNULTY. I don't know for a fact, but I am assuming that—and being straightforward about this—the notion here was to install Mr. Griffin as an interim, give him an opportunity to go into that district and then to work with the home-State Senators on identifying the nominee who would be sent to the Committee for the confirmation process. So I just want to assume that when Mr. Cummins was contacted, there was already a notion that Mr. Griffin would be given an opportunity—

Senator SCHUMER. You are assuming that?

Mr. MCNULTY. That is, I think, a fair assumption.

Senator SCHUMER. All right. Let me ask you this, because we will get some of these answers in writing about outside involvement and what specifically happened in the Bud Cummins case. It sure does not smell too good, and you know that, and I know that. But maybe there is a more plausible explanation than the one that seems to be obvious to everybody. But let's go on to these questions.

Did the President specifically approve of these firings?

Mr. MCNULTY. I am not aware of the President being consulted. I don't know the answer to that question.

Senator SCHUMER. Okay. Can we find out an answer to that?

Mr. MCNULTY. We will take it back.

Senator SCHUMER. Was the White House involved in any way?

Mr. MCNULTY. These are Presidential appointments.

Senator SCHUMER. Exactly.

Mr. MCNULTY. So White House Personnel I am sure was consulted prior to making the phone calls.

Senator SCHUMER. Okay. But we do not know if the President himself was involved, but the White House probably was.

When did the President become aware that certain U.S. Attorneys might be asked to resign?

Mr. MCNULTY. I don't know.

Senator SCHUMER. Okay. Again, I would ask that you get back to us on that.

And the fourth question, which I am sure you cannot answer right now: Was there any dissent over these firings? Do you know if there was any in the Justice Department? Did some people say, "Well, we shouldn't really do this"?

Mr. MCNULTY. I am not aware of that. To the contrary, actually, you know Dave Margolis.

Senator SCHUMER. I do.

Mr. MCNULTY. He has been involved in all of the interviews for every interim who has been put in in this administration. He has been involved in every interview for every U.S. Attorney that has been nominated in this administration. We have a set group of people and a set procedure that involves career people. Dave actually takes the lead role for us in that, and Dave was well aware of this situation.

And so apart from objections, I know of folks who believe that we had the authority and the responsibility to oversee the U.S. Attorney's Offices the way we thought was appropriate.

Senator SCHUMER. Okay. Let me get to the EARS evaluations. Now, you agree that the EARS evaluations address a broad range of performance criteria that is a pretty good—you said it is not the

only criteria, but it is a pretty good basis to start with. Is that fair to say?

Mr. MCNULTY. It can be in some instances. It just depends on what was going on at that office at that time that those evaluators might have been able to spot.

Senator SCHUMER. Okay. Have you seen each—for each of the seven fired U.S. Attorneys, have you seen the EARS evaluations?

Mr. MCNULTY. I have not seen all the evaluations involved in these cases, no.

Senator SCHUMER. Okay. Well, you had said you would be willing to talk over with us what was in those evaluations in private so you would protect the reputations of the U.S. Attorneys. Can we do that this week?

Mr. MCNULTY. Sure. We can try and make that available.

Senator SCHUMER. Great. Thank you. I very much appreciate that.

And do you have any objection in private of providing these evaluations to the Committee, the EARS evaluations?

Mr. MCNULTY. The only reason why I am hesitating on that is because evaluations like that are what we would normally call deliberative material, and Senator Specter and I have discussed this, you know, about the Committee's oversight responsibilities, and I respect the Committee's ability to get information. But often the Committee shows comity to the Department by appreciating the sensitivity of certain things. And we have appreciated your respect for that. And these evaluations are done by career U.S. Attorney Office staff who go into an office and look at it. It is deliberative. It provides information that could be prejudicial to some people. And so that is the only reason why I am not sitting here saying, "Sure." I want—

Senator SCHUMER. Sure, I understand.

Mr. MCNULTY.—to go back and I want to think about what our policy is.

Senator SCHUMER. But don't you agree that probably, given the sensitivities that you have and given the questions we have, it seems to me logical we could work out something that would protect the reputations of those you wish to protect and still answer our questions.

Mr. MCNULTY. My goal is to give you as much information as we possibly can to satisfy your concerns that nothing was done wrong here.

Senator SCHUMER. Good. Okay. And we will endeavor to have the meeting this week, and the legislation is moving. Maybe we can clear the air on all of this—or figure out what happened, anyway, soon.

Let me just ask you this in terms of more shoes that might drop: Is the job of Dan Dzwilewski—now, this is the Special Agent in San Diego. He defended Carol Lam. He called the firing "political." He is the head FBI man over there. Is his job in any danger?

Mr. MCNULTY. No.

Senator SCHUMER. Good. Next, are there any—

Mr. MCNULTY. Certainly—let me just put this—not for reasons related to that comment.

Senator SCHUMER. As of today.

Mr. MCNULTY. If the FBI has some other matter and I don't know—

Senator SCHUMER. I understand. Okay. We don't want him to have a carte blanche. We just don't want him to be fired for speaking his mind here. Okay.

Are there any more firings that might be expected, any other U.S. Attorneys who are going to be asked to resign in the very near future for the law that Senator Feinstein and Senator Specter are—"reinstating," I guess is the right word—takes effect?

Mr. MCNULTY. I am not aware of any other plans at this point to do that.

Senator SCHUMER. Would you be willing to let the committee know if there were any plans, or at least the home-State Senators to know if there are any further plans in this regard before those kinds of firings could occur?

Mr. MCNULTY. That seems rather broad.

Senator SCHUMER. Okay. Why don't you get back to us?

Mr. MCNULTY. We would just have to think about what you are asking there. We want to consult with the home- State Senators of filling those seats. I am not sure if it is good policy for the executive branch to consult with the home-State Senator before removing somebody from a position.

Senator SCHUMER. It really has not—I don't know if it has happened in the past. At least it has not in—I mean, I have had good consultations with the Justice Department on the four U.S. Attorneys in New York. By the way, none of them are going to be asked to resign in the next month or so, are they?

Mr. MCNULTY. We have no—no one is currently being contemplated right now.

Senator SCHUMER. Okay. But it is something maybe you should consider, given everything that is happening here. And if, you know, there is a legitimate reason that somebody should be removed, it might clear the air if the home-State Senators or someone outside of the executive branch were consulted, and the most logical people are, given the traditions, the home-State Senators. So I would ask you to consider that.

Mr. MCNULTY. I appreciate that.

Senator SCHUMER. But you don't have to get me an answer here.

Let me ask you about one further person. There is a U.S. Attorney in Texas. Senator Cornyn has left. He might have more to say about this. But Johnny Sutton has come under considerable fire for prosecuting two border agents who shot an alien smuggler. There have been public calls for his ouster by more than one Congressman. Is his performance in any danger?

Mr. MCNULTY. No.

Senator SCHUMER. Okay—I mean, is his position in any danger. Okay.

I would now like to go on to Carol Lam. We talked a little bit about this. Senator Sessions mentioned all the Congress people who had written letters. I would just ask Senator Sessions one thing: Were those bipartisan letters, do you know? I don't know who the 13 or 18—

Senator SESSIONS. I don't know if it was 13 or 19 people.

Senator SCHUMER. Okay. Well, if you could submit those letters to the record, we could answer that question.

Senator SESSIONS. I would be glad to.

Senator SCHUMER. Great. Without objection.

Now, given the velocity, the heat of the investigations that have gone on in Southern California, did the Justice Department consider the chilling effect or the potential chilling effect on those prosecutions when Carol Lam was fired? I mean, shouldn't it have been a factor as you weighed it?

Mr. MCNULTY. Certainly.

Senator SCHUMER. Do you know if they did?

Mr. MCNULTY. Yes. We—I have to be careful here because, again, I am trying to avoid speaking on specifics. But we would be categorically opposed to removing anybody if we thought it was going to have either a negative effect in fact or a reasonable appearance. Now, we can be accused of anything. We cannot always account for that. But as far as a reasonable perception and factual, that would be a very significant consideration. We would not do it if we thought it was, in fact, interfere with a case.

Senator SCHUMER. So there were discussions about this specific case, and people dismissed any chilling effect—

Mr. MCNULTY. Anytime we would ask for someone—

Senator SCHUMER. Or even as Senator Whitehouse mentioned, the break in the continuity of important ongoing prosecutions. Was that considered in this specific instance?

Mr. MCNULTY. Anytime we do this, we would consider that, and may I say one more thing about it. What happened in the prosecution of Congressman Cunningham was a very good thing for the American people and for the Department of Justice to accomplish. We are proud of that accomplishment. And any investigation that follows from that has to run its full course. Public corruption is a top priority for this Department, and we would only want to encourage all public corruption investigations and in no way want to discourage them. And our record I think speaks for itself on that.

Senator SCHUMER. Were you involved in the decision to dismiss Carol Lam?

Mr. MCNULTY. I was involved in all of this, not just any one person. But I was consulted in the whole decision process.

Senator SCHUMER. Okay. And did you satisfy yourself that—I mean, it would be hard to satisfy yourself about an appearance problem.

Mr. MCNULTY. Right.

Senator SCHUMER. Because there obviously was going to be an appearance problem. On the other hand, certain factors at least in the Justice Department must have outweighed that. It would be hard to believe that Carol Lam was dismissed without cause in your mind. You must have had some cause.

Mr. MCNULTY. All of the changes that we made were performance related.

Senator SCHUMER. Okay. And we will discuss that privately towards the end of the week, so I am not going to try to put you on the spot here. But I do want to ask you this: Did anyone outside the Justice Department, aside from the letters we have seen that Senator Sessions mentioned, urge that Carol Lam be dismissed?

Mr. MCNULTY. I don't know.

Senator SCHUMER. Okay. Could you get an answer to that?

Mr. MCNULTY. You mean anyone—because those letters—

Senator SCHUMER. Those are public letter.

Mr. MCNULTY.—may not be the only letters we have received. We may have received—

Senator SCHUMER. I know, but phone calls, any other—I would like you to figure out for us and get us answers on whether there were other people other than the people who signed—I don't know who they were—who signed the letters that Senator Sessions mentioned, outside the Justice Department, who said—obviously, given the sensitivity of this, this is an important question—who said that Carol Lam should be dismissed. Can you get back to us on that?

Mr. MCNULTY. Yes.

Senator SCHUMER. Thank you.

Mr. MCNULTY. I am only not giving you a definitive answer now because I am trying to avoid talking about any one district.

Senator SCHUMER. Okay.

Mr. MCNULTY. But the suggestion in your question would be whether there might have been some—let's just say on a general matter, not referred to any one district—any undue influence on us from some on the outside.

Senator SCHUMER. Oh, no, I did not ask that. I did not ask whether it was undue.

Mr. MCNULTY. Well, I know you didn't. But I mean generically, I can say with any change we made, they were not subject to some influence from the outside.

Senator SCHUMER. I would just ask that when you meet with us, we get an answer to that question: Who from the outside urged, whether appropriately or inappropriately—it might be appropriate. Certainly a job—if you think a U.S. Attorney isn't doing a good job, to let that be known that she be dismissed.

Okay. Let me just ask you this: We are going to hear from a fine U.S. Attorney from the Southern District, former, and she says in her testimony—she quotes Robert Jackson as Attorney General, and he gave a noted speech to U.S. Attorney. He said this: "Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice." Do you agree with that?

Mr. MCNULTY. I am not sure if I can say that I agree with everything being said in that. You know, what is tricky about this is that, Senator, you or any other Senator on this Committee might call us on another day and say to us, "I want to see more health care fraud cases done. You people have turned your back on that problem." And we would get back to you and say, "Absolutely, Senator. We will take that seriously."

But how could we do that if we did not have some confidence that if we turned around and said to our U.S. Attorneys, "We need you to prioritize health care fraud. It is a growing problem in our country, and you need to work on it"? Now, that is a centralized Washington responsibility going out to the field. So I believe in the Department of Justice this does act with some control over its pri-

orities and its use of its resources. I don't believe, however, that that should go to the question of the integrity or the judgment—

Senator SCHUMER. And he uses the word, in all fairness, he uses the word "wholly." He does not say Washington should have no influence. He says "...cannot be wholly surrendered to Washington..."

Mr. MCNULTY. Well, then, I would agree with that.

Senator SCHUMER. Okay. A final question, and I appreciate the indulgence of my colleagues here, and I will extent to them the same courtesy. On the Feinstein-Specter bill, does the administration—unless you want to ask about this, Arlen, and then—no? Okay.

Senator SPECTER. Well, wait a minute. Are you saying I only have 23 minutes and 28 seconds left?

[Laughter.]

Senator SCHUMER. You can have double that if you wish.

Let's see. Then I will ask it. What objection do you have to Feinstein's bill, the one that Senator Feinstein and Senator Specter put in, which restores a system which seemed to be perfectly adequate for 20 years, including in the Reagan administration, the Bush administration, and the first 6 years of this administration? Are you aware of any legal challenges prior to 2006 to the method of appointing U.S. Interim Attorneys?

Mr. MCNULTY. Well, there are two issues or two legislative proposals that we seem to be talking about. One, I think, is the bill I have in front of me, which is S. 214. And if I am reading it correctly, it goes beyond what existed prior to the amendment in the PATRIOT Act. It gives the appointment authority to the district court, the chief judge of the district, completely. And if I am wrong, someone can correct me on that, but that is my reading of the legislation.

Now there is another idea on the table, which is to restore it to what it was prior to the PATRIOT Act, which gave the Attorney General the authority to appoint someone for 120 days, and then the chief judge would appoint that person afterwards.

Are you asking me about the latter more than the—

Senator SCHUMER. Yes. I am asking you would you have objection, because as I understand it, the sponsors simply want to restore what existed before the PATRIOT Act change. Would the administration be opposed to that?

Mr. MCNULTY. Our position, I think, would be opposition. But we recognize that that is better than what the original legislation is, and the reason is because we supported what was done in the PATRIOT Act because we think it cleaned up a problem that, though it only came up occasionally—and in the great majority of cases, the system did work out okay. When it does come up, it can create some very serious problems.

Senator SCHUMER. But you used the new PATRIOT Act language to go far beyond the specific problem that occurred in South Dakota.

Mr. MCNULTY. Well, that is probably what we are here today to talk about. I don't think that is true, but I understand your perspective on it.

Senator SCHUMER. Okay.

Mr. MCNULTY. And I think that if our concern—if that PATRIOT Act provision had never passed, what would have happened in Arkansas? Would we have been prohibited from going in and asking someone to step aside and placing a new person in? No. It is just that the person would have served for 210 days, and then the chief judge would have had to re-up the person.

So we may still be talking about what happened in Arkansas, and there is a linkage being made to that provision and some initiative that we took afterwards, and there isn't any linkage in our mind.

Senator SCHUMER. I would argue to you—and this will be my last comment—that knowing that there is an outside independent judge of an interim appointment has a positive, prophylactic effect. It makes you more careful as to—it would make any executive more careful about who that interim appointment should be.

Senator Specter?

Senator SPECTER. Thank you.

Are you saying that the Department of Justice will not object to legislation which returns status quo antebellum—because this has been a war—prior to the amendments of the PATRIOT Act?

Mr. MCNULTY. I am not saying we will or we will not object because, sitting here at the table today, I cannot take a position on that legislation. I have to go back and have that decision made.

I am saying, though, that we support the law as it currently stands, and if we come back and object to the legislative idea that you have talked about here today, that would be the reason. But I am not specifically saying today that we are going to object. We have to make a decision in the appropriate way.

Senator SPECTER. That is a "don't know."

Mr. MCNULTY. Correct.

Senator SPECTER. Would you be willing to make a commitment on situations where the Attorney General has an interim appointment to have a presidential appointment within a specified period of time?

Mr. MCNULTY. Don't know.

Senator SPECTER. Well, that clarifies matters—

Mr. MCNULTY. I would have to go back and think about that, but I understand the idea.

Senator SPECTER. I like brief answers and brief lines of questioning.

Would you consult with the home-State Senator before the selection of an Interim U.S. Attorney?

Mr. MCNULTY. We have not done that to date. It—

Senator SPECTER. I know that. Would you?

Mr. MCNULTY. Well, it is something that is worth considering, and it can be a very helpful thing if—

Senator SPECTER. Will consider?

Mr. MCNULTY. Will we consider doing that.

Senator SPECTER. Well, that is what you are saying. I am trying to find your answer here.

Mr. MCNULTY. Right.

Senator SPECTER. Will consider?

Mr. MCNULTY. Yes, we will consider that possibility.

Senator SPECTER. All right. I have 24 more questions, but they have all been asked twice. And I would like to—

Senator SCHUMER. It is good to be the Chairman, isn't it?

Senator SPECTER. And I would like to—I certainly enjoyed it.

[Laughter.]

Senator SPECTER. The gavel was radioactive when I had it. And I would like to hear the next panel, so I will cease and desist.

Senator SCHUMER. Thank you. And I will still call you "Mr. Chairman" out of respect for the job you did.

Senator Whitehouse?

Senator WHITEHOUSE. Thank you. Sorry to step out for a while. We have the Iraq budget down in the Budget Committee, so we are called in many directions here.

Mr. McNulty, you said that the firings were performance related and that there was a set procedure that involves career people that led to this action. To go back to the Washington Post, "One administration official," says the Post, "who spoke on the condition of anonymity in discussing personnel issues, said the spate of firings was the result of"—and here is the quote from the administration official- -'"pressure from people who make personnel decisions outside of Justice'"—capital J, the Department—'"who wanted to make some things happen in these places.'"

Mr. MCNULTY. Whoever said that was wrong. That is—I don't where they would be coming from in making a comment like that because, in my involvement with this whole process that is not a factor in deciding whether or not to make changes or not. So I just don't know—

Senator WHITEHOUSE. What is not a factor?

Mr. MCNULTY. Well, that quote suggests agendas, political or otherwise, outside of the Department. And in looking at how to—or who should be called or encouraged to resign or changes made, they are based upon reasons—they weren't based upon cause, but they were based upon reasons that were Department related and performance related, as we have said. And so I don't ascribe any credibility to that quote in the newspaper.

Senator WHITEHOUSE. Okay. Would you agree with me that—when you are in the process of selecting a United States Attorney for a vacancy, it makes sense to cast your net broadly, make sure you have a lot of candidates, choose among the best, and solicit input from people who are sort of outside of the law enforcement universe? Would you agree with me that it is different when you have a sitting United States Attorney who is presently exercising law enforcement responsibilities in a district how and whether you make the determination to replace that individual?

Mr. MCNULTY. I think that is a fair concern and one distinction that is important to keep in mind.

Senator WHITEHOUSE. You would not want to apply the same process to the removal of a sitting U.S. Attorney that you do when you are casting about for potential candidates for a vacancy?

Mr. MCNULTY. I am not sure I fully appreciate the point you are making here. Could I ask you to restate it so I make sure that if I am agreeing with you, I know exactly what you are trying to say?

Senator WHITEHOUSE. Yes, I think what I am trying to say is that when there is an open seat and you are looking for people to

fill it, you can cast your net pretty broadly, and it is fair to take input from all sorts of folks. It is fair to take input from people in this building.

Mr. MCNULTY. Oh, I see what you are saying.

Senator WHITEHOUSE. It is fair to take input from people you know in law enforcement. It is fair to take input from people at the White House. It is fair to take input from a whole variety of sources.

But it is different once somebody is exercising the power of the United States Government and is standing up in court saying, "I represent the United States of America." And if you are taking that power away from them, that is no longer an appropriate process, in my view, and I wanted to see if that view is shared by you.

Mr. MCNULTY. I think I appreciate what you are saying there, and I think that when it—you know, there are two points. The first is that we believe a U.S. Attorney can be removed—

Senator WHITEHOUSE. Of course.

Mr. MCNULTY.—for reason or for no reason, because they serve at the pleasure of the President. But there is still a prudential consideration. There has got to be good judgment exercised here. And when that judgment is being exercised, there have to be limitations on what would be considered. I think that is what you are suggesting. And there is going to be a variety of factors that may or may not come out in an EARS report or some other kind of well-documented thing. But it comes down to a variety of factors that have to do with the performance of the job, meaning management—

Senator WHITEHOUSE. But they are truly performance related. You do not just move around because, you know, somebody in the White House or somebody in this building thinks, "You know what? I would kind of like to appoint a U.S. Attorney in Arkansas. Why don't we just clear out the guy who is there so that I can get my way." That person might very well, with respect to a vacancy, say, "I want my person there," and that is a legitimate conversation to have, whether you choose it or not. But it is less legitimate when there is somebody in that position, isn't it?

Mr. MCNULTY. Yes, I hear the distinction you are trying to make there. I am not sure I agree with it. The change that is occurring by bringing a new person in versus the change that is occurring by bringing a person in to replace an interim, I am not sure if I appreciate the dramatic distinction between them. If the new person is qualified and if you are satisfied that it is not going to interfere with an ongoing case or prosecution, it is not going to have some general disruptive effect that is not good for the office—

Senator WHITEHOUSE. Well, there is always some disruptive effect when you replace—

Mr. MCNULTY. There is always some, right. The question is: Is it undue or is it substantial beyond the kind of normal turnover things that occur?

I think that there needs to be flexibility there to make the changes that need to be made.

Senator WHITEHOUSE. Finally, have the EARS evaluations changed since I had the pleasure of experiencing one? Do you still go and talk to all the judges in the district? Do you still go and talk

to all the agencies that coordinate with the United States Attorney's Office in the district? Do you still go and talk to community leaders like the Attorney General and police chiefs who are regular partners and associates in the work of the Department of Justice in those areas?

Mr. MCNULTY. That is right. And I don't know if you were in the room when I was having this exchange with Senator Schumer, but I want to say it one more time to make it clear. We are ready to stipulate that the removal of U.S. Attorneys may or may not be something supported by an EARS report, because it may be small business performance related that is not the subject of what the evaluators saw or when they saw it or how it came up and so forth.

I go back to this point because I know that your and Senator Schumer's interest in seeing them is because you want to try to identify "the thing," and say, well, there is justification—or there is not, right? And if there is not, the assumption should not be made that, therefore, we acted inappropriately or that there wasn't other performance- related information that was important to us.

Senator WHITEHOUSE. No, but given the scope of the EARS evaluations, which really went into every nook and cranny of the operational scope of my U.S. Attorney's Office, the idea that there is something else somewhere that might appear and justify the removal of a U.S. Attorney and yet be something that all of the judges in the district, all of the Federal law enforcement agencies in the district, the police chiefs and other coordinating partners with that U.S. Attorney, that all of them were completely unaware of and that never surfaced in the EARS evaluation would be somewhat of an unusual circumstance and I think would require a little bit of further exploration.

Mr. MCNULTY. Well, I appreciate the need for further explanation, and we are committed to working with you to get the answers you are looking for. But maybe EARS reports have changed a bit, but the management of the Department of Justice has changed a bit, too. Because when we announce priorities, we mean it, and priorities and how an office has responded to those priorities may not be measured by the evaluators the way that other things, the more nuts and bolts things are. And that is where those reports are very valuable, but they do not always tell the full story.

Senator WHITEHOUSE. We will follow up.

Thank you, Mr. Chairman.

Senator SCHUMER. Senator Sessions?

Senator SESSIONS. Thank you. I think this is a most interesting discussion. I do have very, very high ideals for United States Attorneys. I think that is a critically important part of our American justice system. I think sometimes that the Department of Justice has not given enough serious thought to those appointments, has not always given the best effort to selecting the best person.

President Reagan, when he was elected and crime was a big problem, he promised experienced prosecutors, and I think that was helpful. I had been an Assistant for 2 years, 2½ years, and that is how I got selected. And I did know something about prosecuting cases. I tried a lot of cases, and I knew something about the criminal system.

So I think Giuliani is correct. You need to have somebody who can contribute to the discussion, who knows something about the business.

With regard to Arkansas, I just took a quick look, and I don't think that Mr. Cummins had any prior prosecutorial experience before he became U.S. Attorney, did he?

Mr. MCNULTY. That is correct. He did not.

Senator SESSIONS. But Mr. Griffin had at least been a JAG prosecutor in the military and had been to Iraq, and he had tried people there, had he not?

Mr. MCNULTY. Tim Griffin had actually prosecuted more cases than a lot of U.S. Attorneys who go into office. A lot of people come from civil backgrounds or policy backgrounds, and he actually had been in court, whether as a JAG here in Fort Campbell, where he tried a very high- profile case, or over in Iraq or as a Special Assistant in that office. And I don't think we should look lightly upon his experience as a prosecutor.

Senator SESSIONS. And he spent a good bit of time with General Petraeus, I guess, with the 101st in Mosul, Iraq, as an army JAG officer. So, anyway, he had some skills and experience beyond politics.

But I want to join with Senator Schumer and my other colleagues in saying I think we need to look at these appointments maybe in the future more carefully. It is a tough job. You have to make tough decisions. I remember—I guess I took it as a compliment—people said that Sessions would prosecute his mother if she violated the law. I guess that was a compliment. I tried to take it as that. So I want to say that.

With regard to the problem of a judge making this appointment, you end up, do you not, with a situation in which the judge is appointing the prosecutor to try the poor slob that is being tried before him?

Mr. MCNULTY. Right.

Senator SESSIONS. In other words, here he is appointing the guy to try the guy, and that really is not a healthy approach for a lot of reasons, and it is not consistent with the Constitution, to my way of thinking, which gives the oversight of U.S. Attorneys to the Senate in the confirmation process, and to some degree the House, because they have got financial responsibilities and so forth.

Is that a problem in your mind that a judge would actually be choosing the person and vouching for the prosecutor who will try the defendant that he is required to give a fair trial to?

Mr. MCNULTY. We have cited that as one of the issues that justified the provision that was in the PATRIOT Act.

Senator SESSIONS. And are there any other circumstances which Federal judges appoint other officers of other Federal agencies that you know of?

Mr. MCNULTY. I am not aware of a situation where someone in another agency. I know certainly situations where someone from private practice was appointed, and that creates difficulties because of—

Senator SESSIONS. No, I am talking about do they ever- -do they have any authority if there is uncertainty over a Department of

Treasury official or a Department of Commerce official that a Federal judge—

Mr. MCNULTY. Oh, I see your question.

Senator SESSIONS.—would appoint those appointments?

Mr. MCNULTY. No. This is unique, actually, and I think that is another argument—

Senator SESSIONS. Yes, I do not think it—I think it is a serious matter.

Now, Senator Schumer, let's think about this. Would it help—and I will ask you your comments, Mr. McNulty—if we had some sort of speedy requirement to submit the nominee for confirmation and give the oversight to the Senate where the Constitution seems to give it? How would you feel about that?

Mr. MCNULTY. I appreciate what you are trying to do there, and we agree with the spirit of that, that we want to get the names up here as fast as possible. The problem is we do not control completely the process for getting the names, because when we are working with home-State Senators or some other person to provide names to us for us to look at, that is a step that is beyond our control. And it could create problems if there is a set time period—

Senator SESSIONS. Well, it could create problems for you, but you are going to have some sort of problems because you are not unilaterally empowered to appoint United States Attorneys. You do not have a unilateral right. So somebody is going to have some oversight.

Mr. MCNULTY. Yes.

Senator SESSIONS. In the other system, you had 120 days and a Federal judge had the responsibility. So you cannot have it like you would like it.

Mr. MCNULTY. Well, I appreciate that, and I am not trying to sound greedy. I am just saying that if we are talking specifically about the idea of a timetable, that is what we would have to look at.

I would actually like to see the Committee just judge us on our track record and look at the openings, look at the interims, look at the nominees, and how long it takes to get to a nomination and then the confirmation. And based upon the track record, that is the oversight, that is the accountability. And I think the record we have is pretty good.

I would like to say one other thing, Senator. Your experience in Alabama and Senator Schumer's experience in New York I think illustrates how appointing somebody to come into a district as an interim, who may eventually get nominated and confirmed, can be a very positive thing. Both in Senator Schumer's case where my predecessor, Jim Comey, was actually an Assistant United States Attorney in my office—and he is from Virginia, and he came up as an assistant to New York to be the interim, sent by Main Justice to New York, but he had connections there and a root there where he started his career. And he was an interim, and then he got nominated for that position later. And then the same thing happened in South Alabama, and it can be a very positive way of dealing with a vacancy and putting a competent person in place that does not come from within that same office.

Senator SESSIONS. I do think that we have a responsibility to at some point confirm United States Attorney nominees if there is time sufficient to do so, but the position cannot go vacant. Somebody has got to hold the job in every district at some point in time because the work of the office cannot continue without somebody as the designated United States Attorney.

I would note that I don't know Arkansas. I think you have learned that you have got to be careful with these offices. There are perceptions out there. Senator Pryor is concerned about this appointment. He is a good man, a former Attorney General. It would have been better, I think, had you been a little more careful with that appointment, although the nominee I think has got a far better track record than some would suggest, the new U.S. Attorney.

I would note that we could give—I will just say it this way. Most of us in the Senate do not review the U.S. Attorney appointments personally. Staff reviews them, and we hear if there are objections and get focused on it if there is a problem. I think we all probably should give a little more attention to it and we hold the administrations as they come forward to high standards about appointments, because it is a very important office.

Mr. MCNULTY. Senator Sessions, to be clear on Arkansas, Tim Griffin is an interim appointment, and consulting with Senator Pryor and Senator Lincoln has been going on for some time. And a nomination in that district will be made in consultation with them. In fact, we will even take his statement that he made here today and look at it closely and see what it is. He said today he was going to talk to Attorney General Gonzales.

That is the process that we are committed to following. There is no effort here to go around Senator Pryor or Senator Lincoln and find a nominee that they would not support. And so that approach in Arkansas has been the same that we have used in all the other places where we seek the guidance and the input from the home-State Senators as we look for someone we can get confirmed by the Senate.

Senator SESSIONS. I would just conclude by noting that there is a danger when politicians get involved in appointments, and particularly when United States Attorneys have to make tough charging decisions like the Border Patrol shooting and other things like that. And we have got to be real careful about that.

I would just say, though, when it comes to priorities of an Assistant U.S. Attorney or the Department of Justice or a U.S. Attorney, then I think the political branch does have a right to question whether the right priorities are being carried out.

Thank you, Mr. Chairman.

Senator SCHUMER. Well, thank you, and I want to thank you, Mr. McNulty. This is not an easy thing for you to come and testify to, and I appreciate your candor in admitting that Bud Cummins was not fired for any particular reason, your willingness to come and talk with us so we can figure out exactly what went on this week, as well as your inclination to both submit the EARS reports and give us information about any outside influences on this. That will be very helpful not only here, but in establishing a smooth working relationship between this Committee and the Justice Department in the new Congress. And the proof of the pudding, obviously, is

going to be in the eating, but I think we look forward to getting real information about what happened here.

Thank you.

Mr. MCNULTY. Thank you.

Senator SCHUMER. Okay. Let me call our next three witnesses, and we appreciate them for their patience. First is Mary Jo White. She is currently a partner at the New York law firm of Debevoise & Plimpton, the first and only woman to have served as the U.S. Attorney for the Southern District, which many view as the best Federal prosecutor's office in the country. Ms. White has a lot to do with the fine reputation of that office, and her own reputation for excellent and integrity is unparalleled. A graduate of William and Mary and Columbia Law School, she was an officer of the Law Review, and I also owe her a personal debt of gratitude because my chief counsel, who has done a great job here, Preet Bharara, sort of worked under her when she lured him away from private practice, and he is still there.

Professor Laurie Levenson is currently Professor of Law and William M. Rains Fellow at Loyola Law School in Los Angeles. She teaches criminal law, criminal procedure, ethics, antiterrorism, and evidence. Prior to joining the faculty at Loyola Law School, Ms. Levenson spent 8 years as an Assistant U.S. Attorney, where she prosecuted violent crimes, narcotic offenses, white-collar crimes, immigration, and public corruption cases. She is a graduate of Stanford and the UCLA Law School, where she was chief articles editor for the Law Review.

Stuart Gerson is currently head of the litigation practice at the law firm of Epstein, Becker & Green. He joined as a partner in 1980. Prior to his return to private practice, Mr. Gerson served as Assistant Attorney General for the Civil Division at the Department of Justice under both President George H.W. Bush and later as Acting Attorney General under President Clinton. He served as an Assistant U.S. Attorney in the District of Columbia and is a graduate of Penn State and the Georgetown University Law Center.

Would all three of you please rise? Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. WHITE. I do.

Ms. LEVENSON. I do.

Mr. GERSON. I do.

Senator SCHUMER. Thank you.

Ms. White, you may proceed.

STATEMENT OF MARY JO WHITE, PARTNER, DEBEVOISE & PLIMPTON, LLP, NEW YORK, NEW YORK

Ms. WHITE. Thank you very much, Senator Schumer, Senator Specter. I am honored to appear before you today. I have spent over 15 years in the Department of Justice both as an Assistant United States Attorney—the best job you can ever have—and as United States Attorney. I served during the tenures of seven Attorneys General of both political parties, most recently John Ashcroft. I was twice appointed as an Interim U.S. Attorney, first in the Eastern District of New York in 1992 by Attorney General William

Barr—and I heard from Mr. Gerson that he also had a hand in signing those papers—and then in 1993 I was appointed as Interim U.S. Attorney in the Southern District of New York by Attorney General Janet Reno. Most recently, as Senator Schumer indicated, I served for nearly 9 years as the presidentially appointed U.S. Attorney in the Southern District of New York from 1993 until January 2002.

Before I comment substantively on the issues before the Committee, let me make very clear up front that I have the greatest respect for the Department of Justice as an institution, and I have no personal knowledge of the facts and circumstances regarding any of the reported requests for resignations of sitting United States Attorneys. Because I do not know the precipitating facts and circumstances, I am not in a position to either support or criticize the particular reported actions of the Department and do not do so by testifying at this hearing. I am, however, troubled by the reports that at least some United States Attorneys—well regarded—have been asked by the Department to resign without any evidence of misconduct or other apparent significant cause. I do find that troubling—if that happened, or even the appearance of that happening—tends to undermine the importance of the office of the United States Attorney, the independence of the United States Attorneys, and the public's sense of evenhanded and impartial justice.

Casual or unwisely or insufficiently motivated requests for U.S. Attorney resignations or the perception of such requests diminish our system of justice and the public's confidence in it.

United States Attorneys are political appointees who do serve at the pleasure of the President. It is, thus, customary and expected that the U.S. Attorneys generally will be replaced when a new President of a different party is elected. There is also no question that Presidents have the power to replace any United States Attorney they have appointed for whatever reason they choose.

In my experience and to my knowledge, however, it would be unprecedented for the Department of Justice or the President to ask for the resignations of U.S. Attorneys during an administration, except in rare instances of misconduct or for other significant cause. This is, in my view, how it should be. U.S. Attorneys are the chief law enforcement officers in their districts, subject to the general supervision of the Attorney General. Although political appointees, the U.S. Attorneys, once appointed, play a critical and non-political, impartial role in the administration of justice in our Federal system.

Senator Schumer alluded to this, but in his well-known address to the United States Attorneys in 1940, then- Attorney General Robert H. Jackson, although acknowledging the need for some measure of centralized control and coordination by the Department, emphasized the importance of the role of the U.S. Attorneys and their independence. He said, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous....Because of this immense power....the post of [United States Attorney] from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States....Your responsibility in your several districts for law enforcement and for its methods cannot be

wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice....Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just."

In my view, the Department of Justice should guard against acting in ways that may be perceived to diminish the importance of the office of United States Attorney or of its independence. Taking nothing away from the career Assistant United States Attorneys and other career attorneys in the Justice Department, changing a United States Attorney invariably causes disruption and often loss of traction in cases and investigations. This is especially so in sensitive or controversial cases where the leadership and independence of the U.S. Attorney are often crucial to the successful pursuit of such matters, particularly in the face of criticism or political backlash.

Replacing a U.S. Attorney can, of course, be necessary or part of the normal and expected process that accompanies a change of the political guard. But I do not believe that such changes should, as a matter of sound policy, be undertaken lightly or without significant cause.

If U.S. Attorneys are replaced during an administration without apparent good cause, the wrong message can be sent to other U.S. Attorneys. We want our U.S. Attorneys to be strong and independent in carrying out their jobs and the priorities of the Department. We want them to speak up on matters of policy, to be appropriately aggressive in investigating and prosecuting crimes of all kinds, and wisely use their limited resources and broad discretion to address the priorities of their particular districts.

In my opinion, United States Attorneys have historically served this country with great distinction. Once in office, they become impartial public servants, doing their best to achieve justice without fear or favor. I am certain that the Department of Justice would not want to act in such a way or have its actions perceived in such a way to derogate from this model of the non-political pursuit of justice by those selected in an open and transparent manner.

Thank you very much. I will be happy to answer your questions.

[The prepared statement of Ms. White appears as a submission for the record.]

Senator SCHUMER. Thank you, Ms. White.

Professor Levenson?

STATEMENT OF LAURIE L. LEVENSON, PROFESSOR OF LAW, WILLIAM M. RAINS FELLOW, AND DIRECTOR, LOYOLA CENTER FOR ETHICAL ADVOCACY, LOYOLA LAW SCHOOL, LOS ANGELES, CALIFORNIA

Ms. LEVENSON. Thank you, Senator Schumer, thank you.

Senator SPECTER. Thank you for the honor to be here today with this distinguished panel. I am here because as a former Assistant United States Attorney—which was the best job I ever had—and as a current professor of criminal law, I care deeply about our Federal criminal justice system.

Does that work now?

Senator SCHUMER. Yes.

Ms. LEVENSON. Okay. I served in the United States Attorney's Office for four different United States Attorneys of both parties and one Interim United States Attorney. I believe that we, in fact, have the best prosecutorial system in the world, but I am here because I fear that the operation of that system and its reputation for excellence is jeopardized because of the increased politicization of the United States Attorney's Offices.

As this Committee knows, the most recent concerns have focused on a rash of dismissals of experienced and respected United States Attorneys across the country. There is at least a strong perception by those in and outside of the United States Attorney's Office that this is not business as usual, that qualified United States Attorneys are being dismissed and their replacements who are being brought in do not have the same experience and qualifications for the position. Moreover, there is a deep concern that the interim appointments by the Attorney General will not be subject to the confirmation process; and, therefore, there will be no check on those qualifications, and the interests of the offices will be sacrificed for political favors.

I want to make three basic points in my testimony today.

One, politicizing Federal prosecutors does have a corrosive effect on the Federal criminal justice system. It is demoralizing to AUSAs. These are the best and the brightest who go there because they are dedicated public servants, and they expect their leaders to be the same. It is also, as we have heard, disruptive to ongoing projects. It creates cynicism among the public. It makes it harder in the long run to recruit the right people for those offices. And as Mr. McNulty said, if you lose the AUSAs, you lose the greatest assets of all.

Second, although there has always been a political component to the selection of United States Attorneys, what is happening now is categorically different. Traditionally, we saw changeover when there was a new administration. Thus, when President Clinton came in, he had every right to and did ask for those resignations. But we have never seen what we are seeing today, which is in quick succession seven U.S. Attorneys who have excellent credentials, successful records, and outstanding reputations being dismissed midterm. And we have never seen their interim replacements, at least some of them, coming in with the lack of experience and qualifications and being put in on an interim basis indefinitely without the prior process that we had for evaluation.

We all recognize that Federal prosecutors serve at the pleasure of the President, and the Department of Justice controls many of the policies and the purse strings. But it has been a strong tradition of local autonomy and accountability and continuity that has made these district U.S. Attorneys successful, not the arbitrary dismissals in order to give others a fresh start. This is an important tradition. With local autonomy and continuity comes a greater ability to serve the needs of the district.

Third, and finally, in my opinion, the prior system—which allowed the Attorney General to indeed appoint the Interim U.S. Attorney for 120 days, and then if there is no confirmed U.S. Attorney, have the chief judge make an interim appointment—was not

only constitutional but, frankly, had advantages over the current procedures.

First, it is constitutional because, under the Appointments Clause and the Excepting Clause to that, inferior officers, which U.S. Attorneys are, may be appointed by the President, courts of law, or heads of departments. And under the Supreme Court's decision written by Chief Justice Rehnquist in *Morrison* v. *Olson*, the role of judges in appointing prosecutors has been held to be constitutional. In that case, which dealt with independent counsel, the Court cited a lower court case dealing with interim U.S. Attorneys and cited it favorably.

I don't think any of the panelists today and any of the witnesses I heard today, in fact, challenge the constitutionality of having judges in the process. But as Mr. Gerson eloquently states in his written testimony, it is a question of congressional discretion.

As a matter of discretion, I think that the prior system, the one that Senators Specter and Feinstein are talking about returning to, has strong benefits in comparison to the new approach.

Under that approach, the Attorney General makes the initial appointment. It gives plenty of time to the Department to come up with a nominee and present that nominee. And then if that is not able to happen in a timely fashion, the chief judge starts making appointments. And can chief judges do this in a fair way? Not only can they, but they have for decades. And that is because in my experience, frankly, the chief judges know the district often better than the people thousands of miles away in the Department of Justice. They know the practitioners in the courtrooms. They care about the cases in their courtroom. And those judges have the credibility and confidence of the public in making their appointments. They appoint magistrate judges, and they even appoint Federal public defenders who, while not Government officials, nonetheless readily and regularly appear before those judges.

I personally have never heard of or seen a case where a judge exerted any pressure on the appointment of an Interim U.S. Attorney or when that person appeared before them because he had made that appointment.

And I think we have to compare it to the current system under the PATRIOT Act where only the Attorney General is involved in the process and those interim appointments can be forever and there may be no or little oversight by the Senate because there is not the traditional confirmation process.

So, in conclusion, I would like to say that whether or not the current Attorney General's recent actions have been in good or bad faith, their impact has been the same. It has demoralized the troops. It has created the perception that politics is playing a greater role in Federal law enforcement. And it has stripped the Senate of its important role in evaluating and confirming the candidates.

In my opinion the healthiest thing to do is not to rely just on what I am sure are the sincere promises of the Department of Justice officials of what they are not going to do with this interim power, but to put in some statutory scheme that allows flexibility of interim appointments but still has accountability. That would mean the Attorney General could make some interim appointments but would restore the Senate's role as a check and balance.

With that, I welcome any questions from the Committee. Thank you.

[The prepared statement of Ms. Levenson appears as a submission for the record.]

Senator SCHUMER. Thank you, Professor Levenson.

Mr. Gerson?

STATEMENT OF STUART M. GERSON, PARTNER, EPSTEIN, BECKER & GREEN, WASHINGTON, D.C.

Mr. GERSON. Mr. Chairman, Senator Specter, it is a great delight always to testify before this Committee, especially as an old Justice Department hand. And I will concur—my wife thinks the best job I have ever had is being her husband, but in terms of what I got paid to do, certainly being an Assistant United States Attorney was a terrific job.

Let me talk to a couple of contrarian issues, but first, Senator Schumer, given the lateness of the hour, I ask your parliamentary discretion in incorporating my written testimony as if read herein full.

Senator SCHUMER. You are indeed an old Justice Department hand. Thank you. Without objection, Mr. Gerson's entire statement will be entered into the record.

Mr. GERSON. Thank you.

I came here, different perhaps from anybody else, with an agenda, and coming last, I have the pleasure of having seen that agenda satisfied. I thought and think that S. 214 is a very bad idea. I thought that Senator Feinstein's reaction, while understandable, was not finely enough drawn. And certainly returning to the previous method of appointments serially of Interim United States Attorneys is vastly superior to what was being proposed, which was taking the executive branch out of an executive function. But that battle now has been won.

I urge you, though, to have hearings on it because it—the idea of including the judiciary at all is not without problems. Different from Ms. Levenson, I actually know of and have experienced some cases where judicial intervention has proved ill-advised and badly directed.

But at the end of the day, I came here to speak for the Constitution, and I think the Constitution has gotten a good break out of the day. We function best when the Executive does things that are committed to the executive branch, the legislature does things that are committed to the legislative branch, and the judiciary fulfills a judicial function, and that those roles, when stuck to, create the right kind of dynamic tension that the Framers had in mind and which has made our written Constitution the oldest written Constitution in the world.

There is a certain sense of deja vu in all of this. One of the reasons perhaps that I was invited is I probably superintended the most dismissals of United States Attorneys that anybody ever did, and I did it accidentally when force of circumstances—and Senator Schumer and Senator Specter remember my unusual circumstance—when I ended up as the long-term Acting Attorney General, and that had never happened in American history, where

a President was saddled for more than a few days with an Attorney General of the other party.

There is something to be said for that, by the way, and in this case, it was easy to support President Clinton's decision to dismiss U.S. Attorneys, many of them on the same day, many of them that had served full terms, and many of them that were involved in ongoing investigations, because it was a presidential prerogative. And I would just note with some irony that I was accused by some of my colleagues of being involved in the termination of the United States Attorney in Arkansas who was in the midst of—actually, she had recused herself, but the office was in the midst of the Whitewater investigation, and that was alleged to have been a coverup on behalf of President Clinton.

Of course, pressure then turned that occupation over to a judicially selected officer and created a situation where a prosecutor responsible to the judicial branch caused a great deal of discomfort, both to the President and to what is now the Democratic majority. And I urge everyone to remember that in looking at the role of the judiciary in a restored context to the one that Senator Schumer I think accurately described. The greatest value of the judiciary is it tells the others—not just the executive branch but the legislative branch to get on with their constitutional business and move on to permanent United States Attorneys with due speed. That is the value of the judicial part of it, not judges picking prosecutors, because that is an anomalous role for the judiciary.

Let me also address one other point, and I am as great an admirer of Justice Jackson as anyone and have learned a lot about what the political branches should do and shouldn't do from reading Justice Jackson. But I want to say a word on behalf of centralization and the proper role of politics. I have seen much of this before. I have dealt with problems between Senators and Presidents for many years. Senator Specter and I and Senator Heinz resolved an issue in the Reagan administration where there was a dispute over who should be the United States Attorney for the Eastern District of Pennsylvania. These disputes are old and oftentimes difficult.

But it should be remembered that there are many valid reasons why the Main Justice component of the Justice Department ought to be able to exert its will over United States Attorney's Offices in a prudent way and why, perhaps, it has not happened enough. I cite several instances of where I myself felt compelled to act and think that I did justice. I am of an age where some of the things I remember best perhaps did not happen, and I am informed that at least one of my examples may be flawed. Although what I stated is true, I attributed something to the then-U.S. Attorney for the Southern District of New York that perhaps I shouldn't have. I apologize to him, and will personally, if I have contradicted his memory. But several cases immediately came to mind where I know that United States Attorneys were not adequately attending to national priorities. One was in the savings and loan crisis. It was very clear that a centrally directed civil system was vastly outperforming the dispersed, decentralized way that the criminal cases in the savings and loan area were being handled, and there were many U.S. Attorneys that did not do a good job. And it was not

until Main Justice imposed task forces on them that that situation improved.

And then I pointed out, last, a situation that I had where, if I had listened to the United States Attorney and, indeed, to the chief judge of the district in which the case was being tried, I would have been complicit in what I thought was an act of racial discrimination in jury selection, albeit involving a minority public official of the opposite party to me. I felt it important to impose my will on the United States Attorney. I think that justice was done. It did not matter to me that it was criticized. It was fairly illuminated in the public record, and that is all that really mattered. But it was certainly something that was warranted no matter how many people I displeased and no matter what an ill effect I might have had on the morale in the given office.

I don't know that morale generally in the United States Attorney's Offices is being challenged. I haven't seen it, and I do work that involves a lot of U.S. Attorneys. I subscribe to Mary Jo White's analysis of what a United States Attorney's Office ought to be. I hope that my career in retrospect will be reviewed and held as consistent with that tradition. I know that I got a great deal of support from Main Justice when I was a prosecutor of cases that were not generally popular, including the prosecution of a United States Senator, including being involved in one of the more controversial Watergate cases. And it was people like Henry Petersen, the legendary figure who was then the head of the Criminal Division, who provided a lot of support for what a rookie line Assistant U.S. Attorney thought needed to be done. And that tradition still is present.

Somebody I got to know in my early days, the first time I was in the Justice Department, is Dave Margolis. You heard about him earlier, and I know he is a person who is familiar to you. It is not the practice of the Justice Department to throw career people to the winds of political judgments and political testimony, but he and so many other people are the folks who make this system go. They are there, whoever are United States Attorneys. Every office has them, and Ms. White and I have been honored, as has Ms. Levenson, to serve with people like that.

So I happily conclude my remarks noting that what I came here to do was achieved when Senator Feinstein took her seat and announced what I think is a beneficial compromise.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gerson appears as a submission for the record.]

Senator SCHUMER. Thank you, Mr. Gerson. And we did say we would try to wrap up by 12:30, so I will keep my questions brief, and we may submit some others in writing.

First, to Mary Jo White, what should be the standard for firing a presidentially appointed U.S. Attorney? What have you understood the historical standard to be? And is it ever wise or appropriate to fire a Senate-confirmed U.S. Attorney simply to give another person a chance?

Ms. WHITE. Senator, in answer to that, clearly the President has the power to remove any U.S. Attorney for any reason or no reason. But as a matter of policy and as a matter of precedent as well, that

in my experience during an administration has not been done, and I do not believe should be done, absent evidence of misconduct or other significant cause. And I think we have to be careful about the slippery slope of performance-related, because I don't think a U.S. Attorney is like any other employee in the sense that it is a presidential appointee. It should be for serious significant cause. It does cause disruption. It does cause a tremendous appearance problem. It can disrupt cases.

So I think the historical pattern has been, absent misconduct or significant cause, that you do not unseat a sitting U.S. Attorney.

Senator SCHUMER. What you say makes a great deal of sense. Even assuming that some people were unhappy with the priorities, say, of Ms. Lam, the problems that this has created, I will bet the Justice Department wishes they had not done what they did. And we do not know the record. Maybe there is some smoking gun, but it is difficult to believe that given the external reports.

Professor Levenson, I just want to ask you, since I read your testimony last night and heard it again here with care, did you find the statement—I will not call it an "admission"—of Deputy Attorney General McNulty that they removed the Arkansas U.S. Attorney—well, I was going to say "troubling," "shocking," "unprecedented." Would you disagree with any of those words?

Ms. LEVENSON. No, I wouldn't. I mean, in some ways it was refreshing to hear him say outwardly that he fired him—

Senator SCHUMER. You bet.

Ms. LEVENSON.—not because he had done anything wrong, but because they wanted to give somebody else a political chance. That is precisely the problem. The job of U.S. Attorney should not be a political prize. There is too much at stake for the district and for the people who work in that office.

Senator SCHUMER. Right. And, finally, to Mr. Gerson, in your time at the Justice Department, which is extensive, did you ever see a U.S. Attorney asked to resign for no reason other than to give someone else a shot?

Mr. GERSON. Yes.

Senator SCHUMER. Do you want to give us the example?

Mr. GERSON. Well, I can't give you a name, and I have tried to think back over this. It was certainly suggested to individuals during my time at the midterm that perhaps it was time to do something else. I can't—

Senator SCHUMER. You mean the 2-year or the 4-year?

Mr. GERSON. The 4-year. But I note that all—it would seem—I don't want to be an apologist for anybody here, and I agree with you that the situation in San Diego is worth examining. I know the person who was deposed. I thought her to be a very fine lawyer, but I don't know any of the circumstances. I dealt with her in health care cases, where she was quite vigorous, not in immigration cases that I have nothing to do with. But all of the individuals involved seemed to me to have served 4 years and were in a subsequent term, and I think that is worth knowing. They had been allowed to serve that time.

I guess I am taking a contrarian view, which is I don't want to adopt some categorical vision that there is anything inherently wrong with looking at an organization while it is healthy and mak-

ing a change. I don't carry any presumption that if someone is doing a good job, they are automatically entitled to continue. On the other hand, I am a conservative in most every way, and I believe in least action, and I generally try to do something for a reason. And I don't conceive that I would have made a change without a reason to do so.

Senator SCHUMER. A final question to you, sir. Given the fact that the replacement in the seven we talked about was probably contemplated before the day they were actually dismissed, isn't 120 days enough?

Mr. GERSON. It should be. It should be, but it should be—let me make it clear. Senator Specter and I have argued with each other over almost three decades now on separation questions. I knew him when he was the DA, so I go back a ways. We were both very young.

I think that it should be a notice both to the executive branch and to the legislature. I don't think that we benefit from having interim anythings for a long period of time and that one ought to move expeditiously to having permanent people who, whether or not it is constitutionally required as a matter of constitutional custom, have their nominations submitted to the Senate and the Senate give advice and consent.

Senator SCHUMER. Thank you.

Senator Specter?

Senator SPECTER. Thank you—I think—Mr. Chairman. I have not been in a situation like this—the Chairman wants to end this hearing at 12:30. It is now 12:29 and a half.

Senator SCHUMER. You can speak as long as you wish.

Senator SPECTER. I have not been in a situation like this since I was invited in 1993 to be the principal speaker at the commissioning of the "Gettysburg" in Maine. And when I looked at the speakers' list, I was ninth. There was an Admiral from Washington. There was an Under Secretary of State. There was the Governor. There was Senator George Mitchell. There was Senator Bill Cohen. And I was called upon to speak at 4:32, and I was told as I walked to the podium that the commissioning had to be at 4:36 because that is when the tide was right. So this brings back fond recollections to be called upon after all the time has expired.

Senator SCHUMER. Well, I just want to remind my colleague, a rising tide lifts all boats.

[Laughter.]

Senator SPECTER. I only wish there were a rising tide in Washington.

But we have the power in the Senate to change the clock. I was on the Senate floor one day when we had to finish activity by midnight, and we stopped the clock at 10 minutes to 12.

Senator SCHUMER. I have heard about that.

Senator SPECTER. Until we finished our work. But on to the serious questions at hand for no more than 3 minutes.

Mr. Gerson, it has been a very important subject today as to what was a person's best job. Now, you have testified that your wife thought being her husband was your best job. But it seems to me that begs the question. Did you think that was your best job?

Mr. GERSON. I darn well better.

Senator SPECTER. Well, that clears the air on that.

In *Morrison* v. *Olson*, the appointment of a special prosecutor was up, and the special prosecutor statute provided that the appointing judge could not preside over any case in which the special prosecutor was involved. Ms. White, do you think we might bring that rule to bear so that if we have the chief judge make the appointment after 120 days, the prosecutor ought not to be able to appear before that judge?

Ms. WHITE. I certainly think that is wise, particularly from an appearance point of view, whether dictated as a matter of constitutional law. And, again, I did not go into the subject of the best mechanism for appointing Interim U.S. Attorneys because I think the solution that seems to be on the table, not perfect, at least in my view, is probably the best one, achieving the best balance, not without its issues, though.

Ms. LEVENSON. Professor Levenson, don't you think it would be a good idea when there is a change of administration to at least make some sort of an inquiry as to whether the firing of all—there were only 92 U.S. Attorneys fired by Attorney General Gerson, as I understand it. I understand they kept Chertoff in Jersey at the request of Senator Bradley—not that that wasn't political. But don't you think there ought to be some inquiry as to what is happening and whether there is some politically sensitive matter so that you just don't have a carte blanche rule? And—

Ms. LEVENSON. I do—

Senator SPECTER. Well, wait a minute. I haven't finished my question. And don't you think that Attorney General Gerson acted inappropriately in firing all those people when Clinton took office? After all, Ruckelshaus resigned and Richardson resigned; they wouldn't fire Archibald Cox. Do you think that Gerson was the Bork of his era?

[Laughter.]

Ms. LEVENSON. I think the record speaks for itself, Senator.

Senator SPECTER. He has already had his turn. I want an answer, Professor Levenson.

Just kidding, just kidding.

How about it, Mr. Gerson, former Attorney General Gerson?

Mr. GERSON. Well, I don't criticize Mr. Bork either. I mean, the buck had to stop at some point in order to have a Justice Department. But there is a difference. I also think that the process worked well even though it had a negative—

Senator SPECTER. It had to stop at some point to have justice, you say?

Mr. GERSON. To have a Justice Department. Somebody has got to run the place. I don't think anybody—

Senator SPECTER. What was wrong with Cox?

Mr. GERSON. Well, I don't think anything was wrong with Cox, and I think the upshot—I think the system worked. I mean, ultimately, the wrongdoing of that administration was exposed and the President resigned in the wake of a continuation of the special prosecutor's function. You can't escape it. And I think that is the point that good oversight makes and why, when all the political branches—both political branches do their job, justice will be served.

Senator SPECTER. Well, I think this question has been very thoroughly aired. Very thoroughly aired. I can't recall a 3-hour-and–36-minute hearing under similar circumstances, and I await the day when Chairman Schumer is Chairman of the full Committee to see us progress in our work.

Thank you all very much.

Senator SCHUMER. Thank you, and I want to thank Senator Specter and all three witnesses for their excellent testimony. I think it has been an excellent hearing, and I have a closing statement that I will submit for the record.

Thank you.

[Whereupon, at 12:36 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 15,2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to the questions for the record for Deputy Attorney General Paul McNulty received from Senators Kennedy and Schumer following the Deputy Attorney General's testimony before the Senate Judiciary Committee on February 6, 2007, about the "Independence of U.S. Attorneys."

Since the Deputy Attorney General's testimony before the Committee and the subsequent receipt of written questions, the Committee's investigation has progressed beyond the scope of the questions, and we believe the course of the investigation makes the questions moot. Mr. McNulty not only testified on February 6 and provided a briefing to Committee members on February 14, but he has also been interviewed on the record, providing the Committee with any additional information that he may personally have. Because the Deputy Attorney General is recused from the matter and because there is a confidentiality agreement with both the Senate Judiciary Committee and the House Judiciary Committee to ensure that those interviewed are not given access to transcripts of other interviewees (letter of March 29, 2007), Mr. McNulty would not have access to any other additional information to provide to the Committee to respond to written questions. Furthermore, the Department has already provided over 6,700 pages of documents to the Committee on March 13, 2007; March 14, 2007; March 19, 2007; March 20, 2007; March 23, 2007; April 13, 2007; April 26, 2007; May 3, 2007; and May 8, 2007; and made more than 1,500 additional pages available for review by Members and Committee staff. Information contained in these documents should be responsive to the questions for the record. The Committee has also had the opportunity to question the Attorney General at a public hearing for more than six hours. Finally, the Department has made available for interviews on the record the Deputy Attorney General's chief of staff, his principal deputy, and a senior member of his staff, in addition to other witnesses. Topics covered during the course of these interviews also should adderss the questions for the record.

In light of the foregoing, we believe that development of formal responses to those questions would not provide any additional information to the Committee.

Please do not hesitate to contact the Department if we can be of assistance in other matters.

Sincerely,

Richard A. Hertling
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member
Committee on the Judiciary

The Honorable Charles Schumer
Chairman
Subcommittee on Administrative Oversight
and the Courts

The Honorable Jeff Sessions
Ranking Minority Member
Subcommittee on Administrative Oversight
and the Courts

Questions for the Record. Senator Edward M. Kennedy
Questions for Deputy Attorney General McNulty

1. You stated in your testimony that the periodic performance evaluations (EARS) of the U.S. Attorneys who were forced to resign would not necessarily reveal the basis for their dismissals. In your subsequent briefing, that certainly seemed to be the case. Are there flaws in the design or execution of the EARS that make them an inadequate management device? Please provide your recommendations for revising the EARS process.

2. You stated in the briefing on February 14 that in the fall of 2006 a decision was made to identify seven or eight U.S. Attorneys for removal. Who participated in that decision? Did anyone from the White House participate in that decision or in any way communicate to the Department of Justice that U.S. Attorneys should be targeted for removal?

3. Why would the Department decide that it was time to remove a group of U.S. Attorneys? Did anyone involved in the process suggest that it might be politically advantageous to do so? If so, who? Did anyone suggest that it would be helpful to open positions so that they could be filled by new people? If so, who?

4. Why were the removals done in bulk, rather than dealing with each allegedly problematic U.S. Attorney as problems arose? Is this a reflection of poor management of the Department of Justice?

5. How many other U.S. Attorneys have been asked to resign or otherwise involuntarily removed during this Administration? Please identify each such U.S. Attorney and his or her replacement.

6. Please identify each individual who served as an interim U.S. Attorney during this Administration and the dates during which he or she served. Please also identify whether each such interim U.S. Attorney served as an Assistant U.S. Attorney before his or her appointment.

7. You have stated that Bud Cummins was asked to resign in Arkansas so that Tim Griffin could be appointed in his place. You have also acknowledged that Harriet Miers, then White House Counsel, called the Department about the replacement of Mr. Cummins with Mr. Griffin. With whom did she speak? What was her stated rationale for the change? Given the commitment of the Attorney General to have the best possible people serving as U.S. Attorneys, did the Department resist Ms. Miers suggestion? If not, how is the Department's behavior consistent with its commitment to merit selection of U.S. Attorneys?

8. Please describe the background investigation and vetting process to which Mr. Griffin was subjected before he was appointed as interim U.S. Attorney.

9. Was any analysis made of the impact on the Eastern District of Arkansas of the proposed change in U.S. Attorneys prior to asking Mr. Cummins to step down? Please provide any and all documents relevant to that analysis.

10. When Mr. Griffin served with the Republican National Committee, files were taken without authorization from Democratic Members of the Senate Judiciary Committee and disseminated to the public. Did you inquire of Mr. Griffin whether he had any role in the dissemination of those files? Has Mr. Griffin been interviewed as part of the investigation into the theft of those files?

11. You suggested in your briefing that career employees were involved in the selection of interim U.S. Attorneys. You mentioned David Margolis, but no others. What other career employees have been involved?

12. You stated that Carol Lamm was removed in part because she emphasized prosecution of large smuggling rings over individual re-entry cases. Please provide the empirical basis for that allegation. Given the volume of illegal entries in that district , does it not make sense to devote resources to prosecution of large cases that will have the biggest impact? How would you measure the relative impact of prosecuting large-scale smugglers as opposed to individuals who cross the border unlawfully.

13. You stated that Ms. Lamm was informed that she should prosecute more individual re-entry cases, but you did not know if she had done so. Did you or anyone examine whether she had complied with your directive before you removed her? Please provide statistics on prosecutions of individual re-entry cases in her district and identify the date on which she was told to increase the number of such prosecutions.

14. As you know, Michael Sullivan, the U.S. Attorney for Massachusetts, has been serving for several months as the acting head of ATF, which has left Massachusetts without a full-time U.S. Attorney. What are the intentions of the Administration regarding these two positions? When can we expect there again to be a full-time U.S. Attorney in Massachusetts?

Written Questions to DAG Paul McNulty from Senator Charles Schumer
Preserving Prosecutorial Independence:
Is the Department of Justice Politicizing the Hiring and Firing of US Attorneys?
February 6, 2007

1. Has the Department of Justice ever taken the position, in any brief, position paper, or application to any court, that United States Attorneys or interim United States Attorneys are "inferior officers" within the meaning of the Constitution?

    a) If so, please explain the position taken and provide any such brief, position paper, or application.

2. Has the Department of Justice ever taken a position, in any brief, position paper, or application to any court, on the Constitutionality of prior statutory provisions allowing the District Court to appoint interim United States Attorneys?

    a) If so, please explain the position taken and provide any such brief, position paper, or application.

3. According to a recent report in the Associated Press, Attorney General Gonzales said that district court judges should not appoint U.S. Attorneys because they "tend to appoint friends and others not properly qualified to be prosecutors." Apart from the one instance in South Dakota in 2005, which you brought to my staff's attention, is there any other example of an inappropriate interim appointment by a District Court judge in the last century?

4. To your knowledge, is there any precedent for an Administration's simultaneously asking for a dozen or more resignations from sitting United States Attorneys in the middle of a Presidential term, as you acknowledged was done on December 6, 2006? Please identify those precedents, if any.

5. Prior to December 7, 2006, how many United States Attorneys were asked to resign in this Administration? Please identify them.

6. To your knowledge, is there any precedent for an Administration's replacing a well-performing United States Attorney with a politically-connected substitute, as you acknowledged was done in the replacing of Arkansas's Bud Cummins with Tim Griffin? Please identify those precedents, if any.

    a) Please describe with particularity who in any way advocated on behalf of Tim Griffin, whether inside or outside of the Administration, either to become the interim United States Attorney or the permanent replacement.

    b) Please explain why Bud Cummins was told to resign in June of 2006, when the other dismissed officials were told in December of 2006? Was the reason to give the replacement, Tim Griffin, a chance to become

ensconced at the U.S. Attorney's Office in Arkansas before making the appointment?

c) Please provide a written explanation of the reasons that the First Assistant in the Eastern District of Arkansas was not selected as the interim United States Attorney upon the departure of Bud Cummins.

d) In light of the unprecedented nature of the appointment, I am especially interested in understanding the role played by Karl Rove. In particular, what role did Karl Rove, with whom Griffin was closely associated, play in the decision to appoint Griffin? In answering this question, please make inquiries within the Justice Department and the White House.

7. At our private briefing on February 14, 2007, you indicated that most of the so-called "performance"-based issues relating to the fired United States Attorneys were not reflected in any document, report, or evaluation.

   a) Please explain why this is so.

   b) Please explain your view of whether firing presidentially-appointed federal prosecutors in the complete absence of a record of performance problems undermines public confidence in the neutral administration of justice.

8. You have indicated that a group of individuals at the Justice Department attempted to identify United States Attorneys about whom there were "serious questions" about their performance.

   a) Please identify with more concreteness the time frame of this evaluation.

   b) Please identify with more concreteness the individuals involved in this evaluation.

   c) Please identify and provide any documents or records generated in connection with this evaluation.

   d) Please explain why this evaluative process was undertaken at all. Why was such an evaluation not undertaken at the end of the natural four-year term of the identified United States Attorneys?

   e) Was there any involvement by the President, the White House Counsel's Office, or anyone else at the White House, prior to the time a list of dismissals was sent over to the White House Counsel's Office for review?

9. You have acknowledged that the so-called EARS evaluations of several fired United States Attorneys might not reflect any of the "performance" problems that ultimately resulted in their dismissal.

    a) Please describe with particularity the EARS evaluation process, with attention to the length of the evaluation, the type of people who participate, the types of interviews conducted, and the typical length of a final EARS report.

10. While it is true that United States Attorneys serve at the pleasure of the President and may be dismissed for any reason, do you believe that there should be some higher standard for the termination of a Presidentially-appointed and Senate-confirmed federal prosecutor? If so, what should that standard be?

SUBMISSIONS FOR THE RECORD

Statement of U.S. Senator Russell D. Feingold
Senate Committee on the Judiciary
Hearing on "Preserving Prosecutorial Independence:
Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"
February 6, 2007

Mr. Chairman, thank you very much for giving me an opportunity to say a few words. I am chairing a hearing in the Africa Subcommittee of the Foreign Relations committee in a few minutes, but I wanted to show my support for the hearing you are holding here, and for Sen. Feinstein's legislation.

It is absolutely vital that our citizens be able to rely on the integrity of the justice system. It is equally important that they have confidence that individuals who represent the federal government in the justice system are above reproach, and are acting in the interest of justice—and not politics—at all times. Even the possibility of any sort of impropriety or overt politicization in the choice of U.S. Attorneys is very troubling, and I am glad that we have an opportunity to investigate this very serious matter.

The Senate confirmation process for U.S. Attorneys ensures transparency and accountability in their selection, and it is very important to protect that process. Wisconsin has developed what I believe is a particularly effective method for handling federal nominations. In 1979, Senators William Proxmire and Gaylord Nelson created the Wisconsin Federal Nominating Commission to advise them on nominations. The Commission process has continued for over a quarter century, used by both Republican and Democratic senators from our state under both Republican and Democratic presidents.

The Commission operates whenever a vacancy occurs for a federal judge or U.S. Attorney position in Wisconsin. The Commission reviews applications and then makes recommendations to the Senators. Senator Kohl and I choose from those recommended by the Commission in making our recommendations to the President. This bipartisan Commission helps ensure that dedicated and qualified individuals fill the positions. It gives our citizens additional assurance that these important nominations are made based on merit, not politics. I believe commissions like this are a particularly reliable and transparent form of filling these vacancies.

Thus, I was deeply troubled when I learned that a change made during the Patriot Act reauthorization process allows the Justice Department to sidestep the confirmation process for U.S. Attorneys altogether. There is simply no good reason why the Attorney General needs the power to make *indefinite* interim appointments. When it exercises that power, whether intended or not, the Administration cuts Congress, and in the case of my state, the people of Wisconsin, out of that process.

I am a cosponsor of the "Preserving United States Attorney Independence Act of 2007," Senator Feinstein's legislation that will close this unnecessary circumvention of the confirmation process. I look forward to the committee's consideration of that bill later this week, and I hope that the hearing this morning will help us fine-tune the bill, if needed. One thing that is very important is to ensure that any individuals who obtained interim appointments under current law do not remain in their posts indefinitely. Provisions ensuring that the confirmation process is not avoided in these cases should be included in the bill.

But this hearing is not just about what process should be in place for filling interim appointments in the future. It is an inquiry into what has already taken place in a range of firings of U.S. Attorneys across the country. I do not know whether concerns that some of these hirings and firings were politically motivated will be validated, but I do know that even an appearance of impropriety can harm our judicial system. A flurry of newspaper articles raising questions about how the Attorney General has used the new indefinite interim appointment power—from both local newspapers and national papers—show that there is such a concern. We in Congress have a duty to address it.

Mr. Chairman, once again, I thank you for calling this hearing and for giving us the opportunity to explore this problem. I can think of few things more appropriate for this committee to consider than the integrity and impartiality of our judicial system and the individuals we select to represent the United States in that system. Thank you again for your courtesy.

PREPARED STAEMENT OF THE HON. STUART M. GERSON
REGARDING PRESERVING PROSECUTORIAL INDEPENDENCE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

February 6, 2007

Mr. Chairman and distinguished members of the Senate Judiciary Committee. It is an honor for a former Justice Department senior official, one who began his legal career as a line Assistant United States Attorney, to be invited back to testify before this Committee on the subject of prosecutorial independence and whether the Department of Justice is unduly politicizing the hiring and firing of U.S. Attorneys.

This is not a new subject, either to this Committee or to me. Indeed, I understand that I have been invited to testify in significant measure because I have substantial direct experience dealing with the issue of the tenure of United States Attorneys in several different capacities during several different administrations.

Accordingly, I shall address the issue from a historical and constitutional perspective but from a practical standpoint as well. This duality of approach suggests several conclusions:

1. Separation of powers concerns inform both the President's appointments authority and the Congress's oversight role with respect to the selection and retention of constitutional officers and "inferior" officers such as United States Attorneys. To the extent that "independence" is a virtue, and that is a term the vitality of which depends upon its definition, it derives from the President's Article II responsibility to "take care" that the law "be faithfully executed." Clearly both common sense and experience,

especially recent history, involving the conduct of so-called Independent Counsels responsible to courts, punctuates the need for separating prosecutorial authority from judicial authority, even as to the issue at hand: filling vacancies caused by the resignation or dismissal of U.S. Attorneys. With respect to said vacancies, one must note that, pursuant to Article II, Congress has the power to assign at least some appointment responsibility to the judiciary, and has done so in the past. My argument, therefore, is addressed to congressional discretion, not its authority. The exercise of that discretion should be tempered by separation of powers concerns.

2. The selection and retention process for United States Attorneys is, and always has been, a "political" matter both because these activities are properly partisan and because their conduct is best confined to the elected, political branches of government.

3. S. 214, while understandably motivated and representative of a situation that might otherwise effectively be addressed, at least through congressional oversight, is misguided because the vacancy problems that it seeks to solve are neither unprecedented nor pervasive, and because the remedy offered, *i.e.*, an exclusive judicial role in dealing with vacant United States Attorneys' positions, contradicts an appropriate executive function, is anomalous and unwelcome to the judiciary and, most importantly, will have the unintended effect of hampering the Senate's proper oversight role of executive functions.

4. The "independence" that should be sought from United States Attorneys is independence of judgment in areas properly consigned to their areas of delegated authority. While that means that a United States Attorney must be free to prosecute wrongdoing, even on the part of the administration that has selected him or her, it does not mean that a United States Attorney must be politically independent of the President and Attorney General in regard to their legal agendas and in rendering appropriate legal advice. There are several checks that insure judgmental independence including congressional oversight and the presence of a capable and distinguished corps of career prosecutors in the various United States Attorneys' offices. In my direct experience, running from the Watergate prosecutions during the Nixon Administration in the 1970's to several matters of note during the Clinton Administration in the 1990's, if there has been any presidential abuse of the prosecutorial function, and that is questionable, it has had nothing to do with vacancies in U.S. Attorneys' offices and any problems were quickly and effectively addressed.

The Law Governing the Appointment of U.S. Attorneys and the Separation of Power Issues That Are Implicated in the Process

Under the Appointments Clause, Art. II, sec. 2, cl. 2, the President is vested with the responsibility of appointing all officers of the United States, subject to Senate confirmation. Art. II, sec. 3 describes the President's fundamental responsibility to "take care" that the laws of the nation "be faithfully executed."

In support of that function, Section 35 of Judiciary Act of 1789 provided for the appointment of an Attorney General who, among other things shall "give his advice and

opinion upon questions of law when required by the President of the United States" or by the heads of the executive branch departments of the government. The same section also provided for the appointment of United States Attorneys:

> And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned . . . .

Through 28 U.S.C. §§ 516 and 519, Congress has given the Attorney General supervisory authority over United States Attorneys, commanding that litigation on behalf of the United States be conducted "under the direction of the Attorney General." *See United States v. Hilario*, 218 F. 3d 19, 25 (1st Cir. 2000). Because United States Attorneys are supervised in significant part (though not completely) by the Attorney General, the case law suggests that they are "inferior" officers whose appointment constitutionally could be assigned by the Congress to a department head like the Attorney General or to a court. *Id.; see Edmond v. United States*, 520 U.S. 651, 659-60 (1997); *compare Morrison v. Olson*, 487 U.S. 654 (1988).

We are not concerned today with the nomination and confirmation of regular United States Attorneys but with the question of how interim United States Attorneys shall be selected (and how long they may serve) when the regular occupant of the office resigns or is terminated. From 1986 until approximately a year ago, the procedures for the appointment of interim U.S. Attorneys were set forth in a version of 28 U.S.C. § 546, which provided:

> (c) A person appointed as United States attorney under this section may serve under section 541 of this title; or

> (1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or
>
> (2) the expiration of 120 days after appointment by the Attorney General under this section.
>
> (d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. . . .

On March 9, 2006, the Patriot Act Reauthorization Bill was signed into law by the President, and this law amended Section 546 of Title 28 by striking subsections (c) and (d), *supra*, and adding a new subsection (c), which provides that a person appointed as an interim U.S. Attorney "may serve until the qualification of a United States Attorney for such District appointed by the President under section 541 of this title." The Patriot Act Reauthorization thus struck the 120 day limit on the service of presidentially-appointed interim U.S. Attorneys and eliminated the courts from the process. Critics opined that this procedure effectively could extend the terms of interim U.S. Attorneys to the end of the term of the President that appoints them and circumvent the Senate's confirmation process..

However, the number of interim U.S. Attorneys appointed by the current administration is not uncharacteristically high and, except where such persons were not able to serve, virtually all of them had been First Assistant United States Attorneys or similar senior supervisory officials in their offices. In other words, they would appear to be qualified to serve in the office, are generally have career status, and are typical of the persons who have been selected as interim U.S. Attorneys in past administrations. And to

the point of the confirmation process, it is my understanding that the current administration has pledged timely to nominate regular replacements where there have been vacancies and to assure that they are promptly subjected to the confirmation process.

Nevertheless, this Committee is considering S. 214, which would amend § 546 of Title 28, this time to eliminate the President from the vacancy filling process by repealing the section (c) that was included in the U.S. Patriot Act Reauthorization law and assigning exclusively to "The United States district court for a district in which the office of the United States attorney is vacant [the authority to] appoint a United States attorney to serve until that vacancy is filled."

One notes with irony that a criticism of the 2006 version of § 546 was that, by Executive Branch fiat, the confirmation process could be thwarted, and that a criticism of the S. 214 version of § 546 is that, by Legislative Branch fiat, the confirmation process could be thwarted. Rather that engage in that kind of hypothesizing, I respectfully suggest that the Committee focus on the fact that, in the American experience it is a constitutional anomaly to include prosecution as part of the judicial power. *See* Prakash, S. B., "The Chief Prosecutor," 73 Geo. Wash. L. Rev. 521 (2005). Where we have transgressed that principle, particularly in the case of court-empowered "independent" counsel, fair minded people of both parties have regretted it. Where other countries, particularly the Soviet bloc states, refused to separate the executive and judicial powers the result was disastrous.

In sum, though U.S. Attorneys are "inferior" officers, an interpretation that is embodied in all iterations of § 546, including the proposal of S. 214, and though an

earlier version of § 546 had an alternative judicial appointment provision, it would be a mistake from a separation of powers standpoint to cut the Executive Branch out of the appointment process for interim United States Attorneys and, unless a compelling need for it were shown, it would seem unnecessary to restore the judiciary to the program, especially in view of evidence that the judiciary is not desirous of the role and has not used it efficaciously on all occasions in the past. I do believe, however, that, if the retention of § 546 as it currently is formulated is unsatisfactory to a majority of the Committee, that the restoration of the previous version is superior to S. 214.

The Appointment of United States Attorneys is Properly a Political Function

When I was acting Attorney General in the first months of the Clinton Administration, a number of my conservative Republican erstwhile colleagues questioned how, on one hand, I could strongly recommend to the Democratic President in whose accidental service I found myself that he continue various Bush administration policies and initiatives implicating the Executive's war powers and foreign affairs powers, but on the other hand proceeded with a certain alacrity to assure that all Republican U.S. Attorney holdovers had to resign or be involuntarily replaced. The answer was a simple one: both hands were working to allow what Madison called an "energetic executive" to exercise his constitutional powers.

While many of the U.S. Attorneys that President Clinton was prepared to appoint, having begun to consult with the Senators from various states, hardly would represent my choices, he had the right, indeed the duty, to set up a legal mechanism to get the legal advice that he would need and position people to carry out his prosecutorial and litigation priorities throughout the country. And it was my obligation to set up a Justice Department

that my confirmed successor might step into and direct, assured that the administration's legal affairs were in the hands of capable attorneys of its choice.

While my personal situation was historically unique, there was nothing at all novel about United States Attorneys being replaced for political reasons. The Reagan administration, for example, acted in its own interests much the same as the Clinton administration had in its when it sought the prompt removal of all U.S. Attorneys from the previous administration, notwithstanding the fact that most of the persons whose nominations were to be submitted had not been selected and many interim persons would be required. One indeed would expect that the next administration will do the same thing and will have every right to act politically as to a task that is properly political – calling for the execution of policy choices accepted by the majority who voted for the new President.

Independence of Legal Judgment Does not Require the Elimination of Politics, but Independence is Sometimes not in the Interest of Justice

When in the early 1970's I was an Assistant United States Attorney in the District of Columbia, I litigated the first case involving the Watergate affair, thwarting an effort by a county district attorney to invade an area of federal prosecutorial prerogatives. Our office undertook a vigorous investigation that led to successful prosecutions and would have led to more, but for the appointment of a special prosecutor who supplanted the line prosecutors. In any event, one had good reason to believe that President Nixon was not at all happy with the energetic conduct of a United States Attorney that he appointed. A little earlier in my public career I prosecuted a sitting United States Senator whose case engendered vigorous comment and attempts to influence the course of litigation by certain of his colleagues. In these and other cases, and in many others in which my co-

workers prosecuted, we enjoyed steadfast support from both our politically-appointed United States Attorney and from the senior career staff in the office and at Main Justice, people like the legendary Henry Peterson, who taught us that our job was to do justice, to prosecute the cases in which we found merit and to decline the cases that we believed should not be brought – and to do both irrespective of outside pressure. That ethic was and is pervasive throughout the Department and the traditionally great United States Attorneys' offices such as the District of Columbia, the Southern District of New York and most others.

But I say with respect that maintaining that ethic, as important as it is, is not contradicted by a President and an Attorney General making political decisions, often in consort with members of the Senate, as to the appointment of U.S. Attorneys and their evaluations and (infrequent) terminations as well. In fact, one might argue that there are areas where the Department does not exercise strong enough control upon United States Attorneys. I offer several examples of matters in which I have been involved to make this point.

By statute, regulation and custom, the oversight and authority exercised by the Civil Division of the Justice Department over United States Attorneys is considerably greater than that generally exercised in the criminal area. During the Savings & Loan debacle of the late '80's and early '90's, the Civil Division, which I headed at the time, with substantial input from our oversight committees on the Hill, was able to undertake a fairly extensive and successful litigation program in consort with Federal thrift regulatory authorities and the civil divisions of various U.S. Attorneys' offices. Until we set up task forces and working groups that sent lawyers and agents from Washington and elsewhere

into to certain key districts, we were less successful on the criminal side, largely because some United States Attorneys did not think that pursuit of this kind of case should be a priority.

Several years later, an investigation produced substantial evidence that Salomon Brothers had misconducted itself in connection with the U.S. Treasury long bond market and that the impropriety was sponsored at the highest levels of the company. A United States Attorney and his senior staff were highly desirous of undertaking a massive prosecution under the securities laws a course of action that was not without legal merit but which also would have ended up depriving the company of most of its assets and employees and ultimately closing it down. That course had an analog in the earlier case of Drexel, Burnham. The Secretary of the Treasury, however, strongly believed that while the management of Salomon brothers had to be removed, sanctioned and replaced, an early settlement that would allow a restructured company to participate in the bond market, offering needed competition and financial stability, was greatly in the public interest. Ultimately this view prevailed, although the United States Attorney believed that his independence had been compromised.

During my service in the Clinton administration, I was presented with what I concluded was persuasive evidence that a United States Attorney and his staff had at least condoned racial discrimination in the selection of a jury about to sit in the trial of a nationally-known minority politician. While the prosecution was clearly in the public interest, discriminatory jury selection was not. I ordered the U.S. Attorney to confess error and, believing that I was interfering with his independence, he resigned. I

immediately appointed a lawyer to serve as Interim U.S. Attorney whom I knew would carry out what I thought to be the policy that justice commanded and he did so.

In all three of these cases, the "independence" of United States Attorneys was severely limited; in all three, I suggest, justice was done.

S. 214 Could Have Unintended and Unacceptable Consequences

The last of my examples is particularly instructive. The pursuit of what I thought was a just prosecutorial decision ended up causing a vacancy in a U.S. Attorney's office. An interim prosecutor was required immediately not only because the trial was imminent but because the underlying matter was controversial, and because the President's party didn't control the Senate, a body which then might not have confirmed a permanent nominee, assuming that the President even had one in mind at that point.. The court in the district in question was extremely hostile to what I was doing. Like the U.S. Attorney who resigned, the chief judge of the court in question saw my action as an unnecessary intrusion from Washington and never would have appointed a suitable interim prosecutor. And even if an unacceptable judicially-appointed prosecutor could be fired, and the Office of Legal Counsel Opinion on the subject generated during the Carter administration and still in force says that he could, that would have been utterly impracticable given the speed of events. In short, a judicial appointment, like that envisioned in S. 214, would have been counterproductive.

The judiciary in various districts has on a number of occasions in the past refused to appoint interim United States Attorneys under the pre-2006 law, and in other cases has appointed unqualified or unsuitable persons. Perhaps this reticence or ineffectiveness

suggests discomfort in the judiciary with respect to undertaking an executive function. It should suggest something else.

This Committee, in particular, but the Senate and the House of Representatives more generally, frequently are interested in what Main Justice and the United States Attorneys are doing in a number of areas of interest including health care fraud, public corruption and the exploitation of children, to name a few. Direct congressional oversight of the Justice Department and U.S. Attorneys offices presents certain difficulties and disputes, but is usually manageable. I respectfully suggest that it is far less likely that effective oversight of a judicially-appointed interim U.S. Attorney, or the court that appointed him or her, could be achieved. I think the Committee and the public would be better served by retaining in the Executive, an inherently Executive Branch prerogative, *i.e.*, the appointment of interim chief prosecutors.

Conclusion

As a reader of or listener to this testimony easily can gather, I do not see a problem with respect to the conduct of the Department of Justice, either in this administration or previously, that necessitates legislation to alter the current method of selection of interim United States Attorneys, or to change the way in which any administration selects, evaluates or replaces its officials. Many problems can be avoided or solved by rigorous adherence to the confirmation process both in terms of the President's promptly submitting U.S. Attorney nominations when vacancies are created, and this Committee's promptly conducting hearings.

Nor do I think that there is a federal prosecutorial system improperly influenced by political decision making. However, without reference to party, effectively separated

constitutional powers allow and require meaningful congressional oversight. Both the majority and minority members of this Committee are fully capable of conducting such inquiries of the Justice Department and need no new legislative tools to do so.

Mr. Chairman, I thank you and the Committee for listening to my comments and I am happy to answer whatever questions you have to the best of my ability.

Edward M. Kennedy Statement
Senate Judiciary Committee Hearing on
"Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"
February 6, 2007

Today's hearing considers the politicization of the hiring and firing of United States Attorneys. In recent weeks, we've learned that the Department of Justice demanded the resignations of a number of long-serving U.S. Attorneys, a number of whom were engaged in high-profile investigations. In some cases, interim replacements have been named who are closely tied to the Administration.

We don't have the full story of these firings and their replacements yet, but the pattern of firings is disturbing, because we know that partisan and ideological hiring has been the hallmark of the Department of Justice in this Administration. Attorney General Ashcroft abolished the honors hiring procedures that were instituted by the Eisenhower Administration to guarantee merit hiring and guard against hiring career attorneys on the basis of partisanship or cronyism.

We've seen an unusually alarming pattern of partisan and ideological hiring in the Civil Rights Division, which has allowed partisanship to influence enforcement of the Voting Rights Act. We can't afford to let the same corrupt practices undermine faith in the enforcement of the federal criminal and civil laws by our U.S. Attorneys.

These attorneys are leaders in the enforcement of federal law. They protect us from violent crime, terrorism, violations of civil rights, organized crime and public corruption. Traditionally, they have practiced law in the district in which they are selected to serve. Most often, they are leading members of the local bar who have distinguished themselves in public service or the private practice of law. They bring to their positions an understanding of their local legal culture that is indispensable to their effectiveness.

Within the Department of Justice, they have a unique role. Formally, they operate within the Department, but they are nominated by the President and confirmed by the Senate and operate in a tradition of some independence from the main Department of Justice. Their responsibility is to carry out the Attorney General's initiatives, but traditionally they have been given broad latitude to develop their own priorities based on their knowledge and understanding of local needs and conditions.

Most important, United States Attorneys must be above partisan or ethical reproach. Many bring to the office some background in political activity, but it is essential that they are seen as being appointed not solely because of political connections, but because of their experience in the law and their ability to enforce the law effectively. Above all, it's the job of the United States Attorney to see that justice is done and to preserve the

confidence of the American people in our system of justice. As the Supreme Court said in *Berger v. United States, 295 U.S. 88 (1935):*

> " The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The recent spate of firings appears to have been facilitated by a little-noticed change in the law that was added quietly to the reauthorization of the Patriot Act last March. Before the change, when a U.S. Attorney vacancy occurred, it could be filled by an interim appointment by the Attorney General for 120 days, after which the local district court could appoint the U.S. Attorney, who would serve pending confirmation by the Senate of the President's nominee. The Patriot Act reauthorization eliminated the 120 day limitation on service by Attorney General appointees. As a result, vacancies can now be filled by the Attorney General without limitation on the term of service of the appointee. In fact, it is now possible for appointees to serve indefinitely, and never face Senate confirmation.

The law must be amended to ensure that the Senate can continue to perform its role of advice and consent. We must guarantee that U.S. Attorney nominees are selected in consultation with the Senate and that they are submitted to the Senate for its consent. The Administration must be held accountable for its choices. The role of U.S. Attorneys in our justice system is far too important to permit any other method of selection.

Mr. Chairman, thank you for convening this important hearing as a welcome new step in reasserting the role of Congress and re-establishing our sound government of checks and balances.

Testimony of Professor Laurie L. Levenson
Senate Judiciary Committee Hearing
"Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"

Feb. 6, 2007

Thank you for the opportunity to testify before your committee. I am currently Professor of Law, William M. Rains Fellow, and Director of the Center for Ethical Advocacy at Loyola Law School. I am the author of several books and dozens of articles, many of which address law enforcement and the criminal justice system. For eight years, from 1981 to 1989, I proudly served as an Assistant United States Attorney for the Central District of California in Los Angeles. As an Assistant U.S. Attorney, I worked as a trial attorney in the Major Crimes and Major Frauds Section, Chief of the Appellate Section and Chief of Training for the Criminal Division. I received the Attorney General's Director's Award for Superior Performance and commendations from the Federal Bureau of Investigation, United States Postal Inspectors, and other federal investigative agencies.

I was hired as an Assistant U.S. Attorney by Andrea S. Ordin, a Democrat appointed by President Jimmy Carter. When she left, I served for three Republican U.S. Attorneys during my tenure in the office. First, I worked for the Honorable Stephen S. Trott, who was appointed by President Ronald Reagan. Next, I worked for interim U.S. Attorney Alexander H. Williams, III , another Republican, who was appointed by the chief judge of our district. Finally, I worked for U.S. Attorney Robert C. Bonner, who was appointed by President George H.W. Bush. The transition from one U.S. Attorney to the next was seamless, and did not carry with it the controversy that has now developed about changes in U.S. Attorneys. I remain in regular contact with current and former federal prosecutors throughout the country. I hear their concerns and try to address them in my articles and books on the role and responsibilities of federal prosecutors.

As a former Assistant United States Attorney who served under both Democratic and Republican administrations, I am deeply concerned about the recent firings of qualified and demonstrably capable United States Attorneys and their replacement with individuals who lack the traditional qualifications for the position. The perception by many, including those who currently serve and have served in U.S. Attorneys Offices, is that there is a growing politicization of the work of federal prosecutors. Asking qualified U.S. Attorneys to leave and replacing them with political insiders is demoralizing; it denigrates the work of hardworking and dedicated Assistant U.S. Attorneys and undermines public confidence in the work of their offices.

Recently, seven United States Attorneys were fired by the Attorney General during the middle of a presidential term. Several of them have excellent reputations for being dedicated, experienced and successful U.S. Attorneys. Nonetheless, they were given no reason for their dismissals and, in at least one case, have been replaced by

someone who does not have the professional qualifications for the position, but comes from a deeply political, partisan background. Perhaps not so coincidentally, all of this is occurring on the heels of the Attorney General securing new statutory power to make indefinite interim appointments of U.S. Attorneys without review by the Senate or any other branch of government.

In my opinion, the new appointment procedures for interim U.S. Attorneys have added to the increasing politicization of federal law enforcement. Under the prior system, the Attorney General could appoint an interim U.S. Attorney for 120 days, giving the President a full four months to nominate and seek confirmation of a permanent replacement. If this was not done, the Chief Justice of the District would appoint an interim U.S. Attorney until a successor U.S. Attorney was nominated and confirmed. This system gave an incentive to the President to nominate a successor in a timely fashion and gave the Senate an opportunity to fulfill its constitutional responsibility of evaluating and deciding whether to confirm that candidate.

Under the present system, the Executive Branch can – and appears determined to – bypass the confirmation role of the Senate by making indefinite interim appointments. The result is a system where political favorites may be appointed without any opportunity for the Senate to evaluate those candidates' backgrounds and qualifications to serve as the chief federal law enforcement officer of their districts. Even if the Attorney General can explain the recent round of firings and replacements, the current statutory system opens the door to future abuses. The public should not have to rely on the good faith of individuals over sound statutory authority to ensure the accountability of key federal law enforcement officials.

In my testimony, I would like to address three key issues: First, the dangers of the politicization of the U.S. Attorneys Offices; second, why the recent actions of this administration are different from those of prior administrations, and third, why it is both constitutional and preferable to have the Chief Judges of the district, not the Attorney General, appoint interim U.S. Attorneys.

The recent perceived purging of qualified U.S. Attorneys is having a devastating impact on the morale of Assistant United States Attorneys. These individuals work hard to protect all of us by prosecuting a wide range of federal crimes. In recent years, AUSAs have struggled with many challenges, including a lack of resources. In Los Angeles (where I served as a federal prosecutor), there have been times recently when there was insufficient paper for the AUSAs to copy documents they were constitutionally required to turn over in discovery. Nonetheless, these professionals persevered at their jobs because of their commitment to pursuing justice on behalf of the people they serve. It is deeply demoralizing for them to now see capable leaders with proven track records of successful prosecutions summarily dismissed and replaced by those who lack the qualifications and professional backgrounds traditionally expected of United States Attorneys.

Moreover, the dismissal of competent U.S. Attorneys and their replacement with interim U.S. Attorneys unfamiliar with local law enforcement priorities and the operation of the offices poses risks to ongoing law enforcement initiatives. Many U.S. Attorneys Offices are engaged in joint task forces with state and local law enforcement agencies. Appointing an interim U.S. Attorney unfamiliar with the district gives the appearance that the ship has lost its rudder, undermines public confidence in federal law enforcement, creates cynicism about the role of politics in all prosecutorial decisions, and makes it more difficult to maintain such joint law enforcement operations.

Although this is not the first time in history that U.S. Attorneys have been asked to submit their resignations, the Attorney General's actions at this time are unlike anything that has occurred before. In my experience, one could expect a changeover in U.S. Attorneys when there was a change in Administrations. United States Attorneys serve at the pleasure of the President and a new President certainly has the right to make appointments to that position. However, we have never seen the type of turnover now in progress, where the Attorney General, not the President, is asking mid-term that demonstrably capable U.S. Attorneys submit their resignations so that Washington insiders may be appointed in their place.

Moreover, we have never seen an Administration accomplish this task by bypassing the traditional appointment process. Under the prior system, the rules for interim appointments limited the Attorney General's power to install a U.S. Attorney for lengthy periods of time without the advice and consent of the Senate. Under the current system, the Attorney General is free to make indefinite interim appointments of individuals whose background, qualifications and prosecutorial priorities are not subjected to Congressional scrutiny.

The issue is one of transparency and accountability. If interim U.S. Attorneys may serve indefinitely without undergoing the confirmation process, the Senate simply cannot fulfill its constitutional "checks and balances" role in the appointment of these officers. The confirmation process serves an important purpose in the selection of U.S. Attorneys. It gives the Senate an opportunity to closely examine the background and qualifications of the person poised to become the most powerful federal officer in each district and to evaluate the priorities that nominee is setting for law enforcement in his or her jurisdiction.

The prior system -- in which the Chief Judge appointed interim U.S. Attorneys if the Administration did not nominate and obtain confirmation for one within four months of the vacancy opening -- had advantages that the current system does not. First, in my experience, the Chief Judges of a district often have a much better sense of the operation of the U.S. Attorney's office and federal agencies in their jurisdiction than those who are thousands of miles away in Washington, D.C. Indeed, in my district and many others, several district judges are themselves former U.S. Attorneys, intimately familiar with the requirements of the office. Their goal is to find a U.S. Attorney who will serve the needs of the local office and the constituents it serves. Chief Judges are generally familiar with the federal bar in the district and with those individuals who could best fulfill the interim

role. The Chief Judges are in an excellent position to find an appointee, often someone from the office itself, who will serve as a steward until a permanent successor is found.

Second, interim appointments by Chief Judges are less likely to be viewed as political favors, because it is understood that the judge's selection can be superseded at any time once the Administration nominates and obtains Senate confirmation of an appointee of its choice. Chief Judges generally have the respect and confidence of those in their district. There is a greater belief that the Chief Judge will have the best operations of the justice system in mind when he or she makes an interim appointment.

In my opinion, the role of judges under the prior system in making interim appointments of United States Attorneys is constitutional and consistent with separation-of-powers principles. In *Morrison v. Olson*, 487 U.S. 654 (1988), the United States Supreme Court held that the role of the courts in appointing independent counsel pursuant to the Ethics in Government Act of 1978 did not violate Article III of the Constitution or separation-of-powers principles. Chief Justice William Rehnquist recognized that the Constitution permits judges to become involved in the appointment of special prosecutors. *See* U.S. Const., Art. II, §2, cl. 2 ("excepting clause" to "Appointments clause"). He then noted that that lower courts had similarly upheld interim judicial appointments of United States Attorneys. *See United States v. Solomon*, 216 F.Supp. 835 (S.D.N.Y. 1963).

Like the role of judges in making appointments of special prosecutors, the role of Chief Judges in making interim appointments of U.S. Attorneys is authorized by the Constitution itself. U.S. Attorneys can be properly considered "inferior officers" for purposes of the Appointments Clause. They have less jurisdiction and overall authority than the Attorney General and rely on the Attorney General for resources and Justice Department policies. The "Excepting Clause" allows judges to be involved in the appointment process of inferior officers. The court's role in appointment of interim U.S. Attorneys does not unnecessarily entangle the judicial branch with the day-to-day operations of the Executive Branch. Moreover, if the Executive Branch disagrees with the court's appointment, it has a ready remedy by nominating and obtaining confirmation of its own candidate.

Nor does the role of judges in appointing a prosecutor violate separation-of-powers principles. The Chief Judge's power to appoint an interim U.S. Attorney does not come with the right to "supervise" that individual in his or her investigative or prosecutorial authority. *Morrison* at 681. The interim U.S. Attorney does not report to the judge and there is no reason to believe that he or she will change prosecutorial policies at the whim of the court. For the reasons the Supreme Court authorized judges to appoint independent counsel in *Morrison*, I believe it is constitutional for Congress to adopt a rule giving judges a role in appointing interim U.S. Attorneys.

The public has great confidence in appointments made by the bench, whether they be of the Federal Public Defender, Magistrate Judges or interim prosecutors. Indeed, the Supreme Court itself has noted the benefits of having judges involved in the appointment

of prosecutors. In *Morrison*, Chief Justice Rehnquist wrote, "[I]n light of judicial experience with prosecutors in criminal cases, it could be said that *courts are especially well qualified* to appoint prosecutors." *Id.* at 676 n.13 (emphasis added).

Last week, in a letter dated February 2, 2007, to Senator Patrick J. Leahy, Chairman of the Senate Judiciary Committee, Acting Assistant Attorney General Richard A. Hertling, claimed that it would be "inappropriate and inconsistent with sound separation of powers principles ... to vest federal courts with the authority to appoint a crucial Executive Branch office such as a United States Attorney." He cited no authority in support of this principle; indeed, the case law, as represented by *Morrison*, goes against him on this point. The Supreme Court has made it quite clear that judges may properly have a role in appointing prosecutors and that such a procedure does not violate constitutional proscriptions or principles of separation of powers.

I was further surprised when Mr. Hertling's letter claimed that an interim U.S. Attorney appointed by the court could not be sufficiently independent because he or she would be "beholden" to the court for making his or her appointment. I am unaware of any situation in which an interim U.S. Attorney failed to do his or her duties because of some supposed indebtedness to the court, nor does Mr. Hertling cite any such example. Moreover, if there ever were to be such a situation, the President could fire that individual and nominate a successor U.S. Attorney who would be subject to the confirmation process.

The recent actions of the Attorney General give the appearance that there is an ongoing effort by the Attorney General to consolidate power over U.S. Attorneys Offices and insulate their actions from the scrutiny of Congress. It is very hard to otherwise explain why a U.S. Attorney like Bud Cummins III would be terminated after receiving sterling evaluations and replaced by a political adviser who doesn't have nearly the same qualifications. Such actions are likely to work against the interest of federal law enforcement and of the American public.

Ultimately, the debate today is about what we want our U.S. Attorneys Offices to be. If they are to be professional law enforcement offices responding to the needs of the citizens of their districts, they must be led by independent professionals with the support of the Justice Department. If and when they become mere rewards or resume builders for those in the good graces of the Attorney General, they will quickly lose their credibility and thus their ability to perform their jobs effectively. U.S. Attorneys Offices which become – or are perceived to have become – politicized will cease to attract the best and the brightest of lawyers committed to serving the public as dedicated, politically independent professionals. The new Act authorizing appointment of interim U.S. Attorneys for an indefinite period of time creates a serious risk this will occur, because it undermines the Senate's role in evaluating and confirming candidates. As such it poses a much greater risk to constitutional principles, including the separation of powers, than does the role of judges in making interim appointments.

Department of Justice

STATEMENT

OF

PAUL J. MCNULTY
DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"PRESERVING PROSECUTORIAL INDEPENDENCE:
IS THE DEPARTMENT OF JUSTICE
POLITICIZING THE HIRING AND FIRING
OF U.S. ATTORNEYS?"

PRESENTED ON

FEBRUARY 6, 2007

Testimony
of

Paul J. McNulty
Deputy Attorney General
U.S. Department of Justice

Committee on the Judiciary
United States Senate

"Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"

February 6, 2007

Chairman Leahy, Senator Specter, and Members of the Committee, thank you for the invitation to discuss the importance of the Justice Department's United States Attorneys. As a former United States Attorney, I particularly appreciate this opportunity to address the critical role U.S. Attorneys play in enforcing our Nation's laws and carrying out the priorities of the Department of Justice.

I have often said that being a United States Attorney is one of the greatest jobs you can ever have. It is a privilege and a challenge—one that carries a great responsibility. As former Attorney General Griffin Bell said, U.S. Attorneys are "the front-line troops charged with carrying out the Executive's constitutional mandate to execute faithfully the laws in every federal judicial district." As the chief federal law-enforcement officers in their districts, U.S. Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. They lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

U.S. Attorneys are not only prosecutors; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Department of Justice—including the office of United States Attorney—was created precisely so that the government's legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. For these reasons, the Department is committed to having the best person possible discharging the responsibilities of that office at all times and in every district.

The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys are removed or asked or encouraged to resign from time to time. However, in this Administration U.S. Attorneys are never—repeat, never—removed, or asked or encouraged to resign, in an effort to retaliate against them, or interfere with, or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality the Department has earned over many years and on which it depends.

Turnover in the position of U.S. Attorney is not uncommon. When a presidential election results in a change of administration, every U.S. Attorney leaves and the new President nominates a successor for

confirmation by the Senate. Moreover, U.S. Attorneys do not necessarily stay in place even during an administration. For example, approximately half of the U.S. Attorneys appointed at the beginning of the Bush Administration had left office by the end of 2006. Given this reality, career investigators and prosecutors exercise direct responsibility for nearly all investigations and cases handled by a U.S. Attorney's Office. While a new U.S. Attorney may articulate new priorities or emphasize different types of cases, the effect of a U.S. Attorney's departure on an existing investigation is, in fact, minimal, and that is as it should be. The career civil servants who prosecute federal criminal cases are dedicated professionals, and an effective U.S. Attorney relies on the professional judgment of those prosecutors.

The leadership of an office is more than the direction of individual cases. It involves managing limited resources, maintaining high morale in the office, and building relationships with federal, state and local law enforcement partners. When a U.S. Attorney submits his or her resignation, the Department must first determine who will serve temporarily as interim U.S. Attorney. The Department has an obligation to ensure that someone is able to carry out the important function of leading a U.S. Attorney's Office during the period when there is not a presidentially-appointed, Senate-confirmed United States Attorney. Often, the Department looks to the First Assistant U.S. Attorney or another senior manager in the office to serve as U.S. Attorney on an interim basis. When neither the First Assistant nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees.

At no time, however, has the Administration sought to avoid the Senate confirmation process by appointing an interim U.S. Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination, confirmation and appointment of a new U.S. Attorney. The appointment

of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by both the Senate and the Administration.

In every single case where a vacancy occurs, the Bush Administration is committed to having a United States Attorney who is confirmed by the Senate. And the Administration's actions bear this out. Every time a vacancy has arisen, the President has either made a nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination and confirmation of a new United States Attorney. Not once.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed candidates for nomination for seven more positions, and is waiting to receive names to set up interviews for the final position—all in consultation with home-state Senators.

However, while that nomination process continues, the Department must have a leader in place to carry out the important work of these offices. To ensure an effective and smooth transition during U.S. Attorney

vacancies, the office of the U.S. Attorney must be filled on an interim basis. To do so, the Department relies on the Vacancy Reform Act ("VRA"), 5 U.S.C. § 3345(a)(1), when the First Assistant is selected to lead the office, or the Attorney General's appointment authority in 28 U.S.C. § 546 when another Department employee is chosen. Under the VRA, the First Assistant may serve in an acting capacity for only 210 days, unless a nomination is made during that period. Under an Attorney General appointment, the interim U.S. Attorney serves until a nominee is confirmed the Senate. There is no other statutory authority for filling such a vacancy, and thus the use of the Attorney General's appointment authority, as amended last year, signals nothing other than a decision to have an interim U.S. Attorney who is not the First Assistant. It does not indicate an intention to avoid the confirmation process, as some have suggested.

No change in these statutory appointment authorities is necessary, and thus the Department of Justice strongly opposes S. 214, which would radically change the way in which U.S. Attorney vacancies are temporarily filled. S. 214 would deprive the Attorney General of the authority to appoint his chief law enforcement officials in the field when a vacancy occurs, assigning it instead to another branch of government.

As you know, before last year's amendment of 28 U.S.C. § 546, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was consequently required to make multiple successive 120-day interim appointments. Other district

courts ignored the inherent conflicts and sought to appoint as interim U.S. Attorneys wholly unacceptable candidates who lacked the required clearances or appropriate qualifications.

In most cases, of course, the district court simply appointed the Attorney General's choice as interim U.S. Attorney, revealing the fact that most judges recognized the importance of appointing an interim U.S. Attorney who enjoys the confidence of the Attorney General. In other words, the most important factor in the selection of past court-appointed interim U.S. Attorneys was the Attorney General's recommendation. By foreclosing the possibility of judicial appointment of interim U.S. Attorneys unacceptable to the Administration, last year's amendment to Section 546 appropriately eliminated a procedure that created unnecessary problems without any apparent benefit.

S. 214 would not merely reverse the 2006 amendment; it would exacerbate the problems experienced under the prior version of the statute by making judicial appointment the only means of temporarily filling a vacancy—a step inconsistent with sound separation-of-powers principles. We are aware of no other agency where federal judges—members of a separate branch of government—appoint the interim staff of an agency. Such a judicial appointee would have authority for litigating the entire federal criminal and civil docket before the very district court to whom he or she was beholden for the appointment. This arrangement, at a minimum, gives rise to an appearance of potential conflict that undermines the performance or perceived performance of both the Executive and Judicial Branches. A judge may be inclined to select a U.S. Attorney who shares the judge's ideological or prosecutorial philosophy. Or a judge may select a prosecutor apt to settle cases and enter plea bargains, so as to preserve judicial resources. *See* Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys, 86 Minn. L. Rev. 363, 428 (2001) (concluding that court appointment of interim U.S. Attorneys is unconstitutional).

Prosecutorial authority should be exercised by the Executive Branch in a unified manner, consistent with the application of criminal enforcement policy under the Attorney General. S. 214 would undermine the effort to achieve a unified and consistent approach to prosecutions and federal law enforcement. Court-appointed U.S. Attorneys would be at least as accountable to the chief judge of the district court as to the Attorney General, which could, in some circumstances become untenable. In no context is accountability more important to our society than on the front lines of law enforcement and the exercise of prosecutorial discretion, and the Department contends that the chief prosecutor should be accountable to the Attorney General, the President, and ultimately the people.

Finally, S. 214 seems to be aimed at solving a problem that does not exist. As noted, when a vacancy in the office of U.S. Attorney occurs, the Department typically looks first to the First Assistant or another senior manager in the office to serve as an Acting or interim U.S. Attorney. Where neither the First Assistant nor another senior manager is able or willing to serve as an Acting or interim U.S. Attorney, or where their service would not be appropriate under the circumstances, the Administration has looked to other Department employees to serve temporarily. No matter which way a U.S. Attorney is temporarily appointed, the Administration has consistently sought, and will continue to seek, to fill the vacancy—in consultation with home-State Senators—with a presidentially-nominated and Senate-confirmed nominee.

Thank you again for the opportunity to testify, and I look forward to answering the Committee's questions.

Opening Statement of Senator Charles E. Schumer
"Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"
Senate Committee on the Judiciary
February 6, 2007, 9:30 A.M.

We are holding this hearing because many members of this Committee, including Chairman Leahy, have become increasingly concerned about the administration of justice and the rule of law in this country.

I have observed, with increasing alarm, how politicized the Department of Justice has become.

I have watched, with growing worry, as the Department has increasingly based hiring on political affiliation; ignored the recommendations of career attorneys; focused on the promotion of political agendas; and failed to retain legions of talented career attorneys.

I have sat on this Committee for eight years, and before that on the House Judiciary Committee for sixteen.

During those combined twenty-four years of oversight over the Department of Justice – through seven presidential terms, including three Republican presidents – I have never seen the Department more politicized and pushed further away from its mission as an apolitical enforcer of the rule of law.

And now, it appears, even the hiring and firing of our top federal prosecutors has become infused and corrupted with political, rather than prudent, considerations. Or at least, there is a very strong appearance that this is so.

For six years there has been little or no oversight of the Department of Justice. Those days are over.

There are many questions surrounding the firing of a slew of U.S. Attorneys. I am committed to getting to the bottom of those questions.

If we do not get the documentary information that we seek, I will consider moving to subpoena that material, including performance evaluations and other documents.

If we do not get forthright answers to our questions, I will consider moving to subpoena one or more of the fired U.S. Attorneys so that the record is clear.

So, with that in mind, let me turn to the issue at the center of today's hearing.

Once appointed, U.S. Attorneys, perhaps more than any other public servant, must be above politics and beyond reproach. They must be seen to enforce the rule of law without fear or favor.

When politics unduly infects the appointment and removal of U.S. Attorneys, what happens?

Cases suffer. Confidence plummets. And corruption has a chance to take root.

What has happened here over the last 7 weeks is nothing short of breathtaking.

Less than two months ago, seven or more U.S. Attorneys reportedly received an unwelcome Christmas present. As the *Washington Post* reports, those top federal prosecutors were called and terminated on the same day.

The Attorney General and others have sought to deflect criticism by suggesting that these officials all had it coming because of poor performance; that U.S. Attorneys are routinely removed from office; and that this was only business as usual.

But what happened here doesn't sound like an orderly and natural replacement of underperforming prosecutors; it sounds more like a purge.

What happened here doesn't sound like business as usual; it appears more reminiscent of a different sort of Saturday night massacre.

Here's what the record shows:

- Several U.S. Attorneys were apparently fired with no real explanation.
- Several were seemingly removed merely to make way for political up-and-comers.
- One was fired in the midst of a successful and continuing investigation of lawmakers.
- Another was replaced with a pure partisan of limited prosecutorial experience, without Senate confirmation.
- And all of this, coincidentally, followed a legal change – slipped into the PATRIOT Act in the dead of night – which for first time in our history gave the Attorney General the power to make indefinite interim appointments and to bypass the Senate altogether.

We have heard from prominent attorneys – including many Republicans – who confirm that these actions are unprecedented, unnerving, and unnecessary:

- The former San Diego U.S. Attorney, Peter Nunez, who served under Reagan said: "[This] is like nothing I've ever seen before in 35-plus years." He went on to say that while the President has the authority to fire a U.S. Attorney for any reason, it is "extremely rare" unless there is an allegation of misconduct.

- Another former U.S. Attorney and head of the National Association of Former United States Attorneys said members of his group were in "shock" over the purge, which "goes against all tradition." [*Washington Post*, February 4, 2007].

The Attorney General, for his part, has flatly denied that politics has played any part in the firings. At a Judiciary Committee hearing last month, he testified that:

> "I would never, ever make a change in a U.S. Attorney position for political reasons."

And yet, the recent purge of top federal prosecutors reeks of politics. An honest look at the record reveals that something is rotten in Denmark:

- In Nevada, where U.S. Attorney Daniel Bogden was reportedly fired, a Republican source told the press that "the decision to remove U.S. attorneys . . . was part of a plan to 'give somebody else that experience' to build up the back bench of Republicans by giving them high-profile jobs." [*Las Vegas Review-Journal*, January 18, 2007].

- In New Mexico, where U.S. Attorney David Iglesias was reportedly fired, he has publicly stated that when he asked why he was asked to resign, he "wasn't given any answers."

- In San Diego, where U.S. Attorney Carol Lam was reportedly fired, the top-ranking FBI official in San Diego said: "I guarantee politics is involved." [Dan Dzwilewski, quoted in the *San Diego Union-Tribune*, January 13, 2007] And the former U.S. Attorney under President Reagan said, "It really is outrageous." [*North County Times*]

    - Ms. Lam, of course, was in the midst of a sweeping public corruption investigation of Randy "Duke" Cunningham and his co-conspirators, and her office has outstanding subpoenas to three House Committees.

    - Was her firing a political retaliation? There is no way to know. But the Department of Justice should go out of its way to avoid even the appearance of impropriety. That is not too much to ask. And, as I've said, the appearance here – given all the circumstances – is awful.

- Finally, in Arkansas, where U.S. Attorney Bud Cummins was forced out, there is not a scintilla of evidence that he had any blemish on his record. In fact, he was

well-respected on both sides of the aisle, and was in the middle of a number of important investigations.

- His sin? Occupying a high profile position that was being eyed by an ambitious acolyte of Karl Rove, who had minimal federal prosecution experience, but was highly skilled at opposition research and partisan attacks for the Republican National Committee.

- Among other things, I look forward to hearing the Deputy Attorney General explain to us this morning how and why a well-performing prosecutor was axed in favor of such a partisan warrior. What strings were pulled and what influence was brought to bear?

- In June of 2006, when Karl Rove was himself still being investigated by a U.S. Attorney, was he brazenly leading the charge to oust a sitting U.S. Attorney and install his own former aide?

Now, I ask, is this really how we should be replacing U.S. Attorneys in the middle of a Presidential term?

No one doubts the President has the legal authority to do it, but can this build confidence in the Justice Department? Can this build confidence in the administration of justice?

Of course, what makes these firings especially troubling is their timing: mere months after the Administration secured unprecedented power – under the PATRIOT Act – to appoint interim U.S. Attorneys indefinitely.

For 20 years, the Attorney General could appoint an interim for 120 days, after which the chief judge had the authority to make the appointment, if the Senate had not yet confirmed a replacement.

And for decades before that, the District Court alone had the authority to appoint an interim U.S. Attorney.

There is absolutely no Constitutional problem with the previous system, as every former DOJ official testifying here today acknowledges.

Though the Department now "strongly opposes" any return to the old system, the Department cites no case in support of its view.

There is, however, a Supreme Court case, *Morrison v. Olson*, making it absolutely clear that interim federal prosecutors are inferior officers who may be appointed by the courts.

Moreover, almost a week after my staff asked for specific examples of judges making arguably unsuitable appointments, the Department was able to come up with precisely ONE in the last hundred years.

I respectfully suggest that the Attorney General possibly has a worse track record for making unsuitable interim appointments in just the last seven weeks.

Let me finish by making three quick points.

First, no one is saying that underperforming U.S. Attorneys should not be removed. Every President has done it, and should do it, and good management improves public confidence. That does not appear, in too many instances, to be at the bottom of what's happened here.

Second, no one is saying that politics doesn't play any role in the picking of U.S. Attorneys. They are, after all, political appointments. And no one is saying that some political experience or affiliation should render a candidate unsuitable. Indeed, just last year we unanimously approved a highly regarded counsel to Senator Specter to be U.S. Attorney in Utah.

Third, no one is accusing the Administration of blatantly removing a U.S. Attorney to put an end to an inconvenient and damaging public corruption investigation. But, some are rightly noting the appearance of such a conflict and are correctly asking the Department to demonstrate that retaliation was not a motive here.

In the end, justice must not only be done, it must be seen to be done.

I cannot improve on the words of former Attorney General, and later Supreme Court Justice Robert Jackson. Mary Jo White, in her own testimony, cites to this passage from a famous speech he gave to United States Attorneys in 1940:

> "It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."

That is why we are holding this hearing.

That is why this hearing is so important.

And that is why I hope we get candid answers to our questions.

Now, let me turn to our Ranking Member, Senator Specter.

Statement of Mary Jo White

Senate Committee on the Judiciary
Hearing: "Preserving Prosecutorial Independence:
Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"
February 6, 2007

My name is Mary Jo White. I am providing this written statement and testifying at this hearing at the invitation of Senator Patrick Leahy, the Chairman of the United States Senate Committee on the Judiciary.

By way of background, I spent over fifteen years in the Department of Justice (the "Department"), both as an Assistant United States Attorney and as United States Attorney. I served during the tenures of seven Attorneys General: Griffin B. Bell, Benjamin R. Civiletti, William French Smith, Richard L. Thornburgh, William P. Barr, Janet Reno and John Ashcroft. I was twice appointed as an Interim United States Attorney, first in the Eastern District of New York in 1992 by Attorney General Barr and then in 1993 by Attorney General Reno in the Southern District of New York. Most recently, I served for nearly nine years as the Presidentially-appointed United States Attorney in the Southern District of New York from September 1993 until January 2002. I was the Chair of the Attorney General's Advisory Committee from 1993-1994. Since April 2002, I have served as the Chair of the Litigation Group of Debevoise & Plimpton LLP, the law firm at which I started my legal career.

Maintaining the prosecutorial independence of the United States Attorneys, which is the subject of this hearing, is vital to ensuring the fair and impartial administration of

justice in our federal system. Concerns have recently been raised as to whether that independence is being compromised by the reported installation by the Department of Justice of Interim United States Attorneys in replacement of a number of sitting Presidentially-appointed United States Attorneys who have allegedly been asked to resign in the absence of misconduct or other compelling cause. It has been variously suggested that at least some of these resignations have been sought from qualified United States Attorneys in favor of appointees who may be more politically and behaviorally aligned with the Department's priorities; to replace a United States Attorney because of public corruption or other kinds of sensitive cases and investigations brought or in process; as a result of a Congressman's criticism; or just to give another person the opportunity to serve and have the high-profile platform of serving as a United States Attorney. These allegations, in my view, raise legitimate concerns for this Committee about the fair and impartial administration of justice, both in fact and in appearance. If the allegations were true, the actions being taken by the Department would appear to pose a threat to the independence of the United States Attorneys and to diminish the importance of the jobs they are entrusted to do. There would be, at a minimum, a significant appearance issue.

A related concern has been raised about a recent change in the statutory framework for the appointment of Interim United States Attorneys embodied in the re-authorized USA Patriot Act.[1] Under the new provision, the Attorney General is accorded unilateral power to make appointments of Interim United States Attorneys for an indefinite period of time, without the necessity of obtaining the advice and consent of the

United States Senate, which is required for every Presidentially-nominated United States Attorney. Previously, the law empowered the Attorney General to appoint Interim United States Attorneys for a period up to 120 days; thereafter, if no successor was nominated by the President and confirmed by the Senate, the chief judge of the relevant district court was accorded the power of appointment until a Presidentially-appointed successor was confirmed by the Senate.

For whatever assistance it may be to the Committee, I will provide my personal perspective on these issues. Before doing so, let me make very clear up front that I have the greatest respect for the Department of Justice as an institution and have no personal knowledge of the facts and circumstances regarding any of the reported requests for resignations of sitting United States Attorneys. And, with one exception, I do not know any of the United States Attorneys in question or their reported replacements. The one exception is the United States Attorney for the Southern District of California, a career prosecutor, whom I know and first came to know of when she was an Assistant United States Attorney doing very impressive work in the area of healthcare fraud. Because I do not know the precipitating facts and circumstances, I am not in a position to support or criticize the reported actions of the Department and do not do so by testifying at this hearing. I can and will speak only about my views about the importance of the United States Attorneys to our federal system of criminal and civil justice, the importance of preserving the independence of the United States Attorneys, and how I believe that casual

or unwisely motivated requests for their resignations could undermine our system of justice and diminish public confidence.

My views on the issues I understand to be before the Committee are as follows:

- United States Attorneys are political appointees who serve at the pleasure of the President. It is thus customary and expected that the United States Attorneys generally will be replaced when a new President of a different party is elected. There is also no question that Presidents have the power to replace any United States Attorney they have appointed for whatever reason they choose.

- In my experience and to my knowledge, however, it would be unprecedented for the Department of Justice or the President to ask for the resignations of United States Attorneys during an Administration, except in rare instances of misconduct or for other significant cause. This is, in my view, how it should be.

- United States Attorneys are, by statute and historical custom, the chief law enforcement officers in their districts, subject to the general supervision of the Attorney General.[2] Although political appointees, the United States Attorneys, once appointed, play a critical and non-political, impartial role in the administration of justice in our federal system. Their selection is of vital national and local interest.

- In his well-known address to the United States Attorneys in 1940, then Attorney General Robert H. Jackson, although acknowledging the need for some measure of centralized control and coordination by the Department, eloquently emphasized the importance of the role of the United States Attorneys and their independence:

> It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.
>
> . . . .
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> These powers have been granted to our law-enforcement agencies because it seems necessary

> that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.
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> . . . .
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> Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of [United States Attorney] from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. You are thus required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.
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> . . . .
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> Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice.
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> . . . .
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> Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just.
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> . . . .
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> The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many [United States Attorneys] from the embarrassment of what have heretofore been regarded as legitimate expectations of political service. . . . I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and prestige. . . .[3]

- Justice Jackson's remarks capture well the importance of both the role of United States Attorneys and the independence that is necessary to successfully fulfill their role. The Department of Justice should guard

carefully against acting in ways that may be perceived to diminish the importance of the office of United States Attorney or of its independence.

- Changing a United States Attorney invariably causes disruption and loss of traction in cases and investigations in a United States Attorney's Office. This is especially so in sensitive or controversial cases and investigations where the leadership and independence of the United States Attorney are often crucial to the successful pursuit of such matters, especially in the face of criticism or political backlash. Replacing a United States Attorney can, of course, be necessary or part of the normal and expected process that accompanies a change of the political guard. But I do not believe that such changes should, as a matter of sound policy, be undertaken lightly or without significant cause. In this and most previous Administrations, the United States Attorneys appointed by the prior Administration were replaced in an orderly and respectful fashion over several months after the election to allow for a smooth transition. If wholesale change in the United States Attorneys is to occur, it should be done in this way. In my view, wholesale replacement of the United States Attorneys should not be done immediately following an election, as occurred at the outset of the Clinton Administration—such abrupt change is not necessary and can undermine the important work of the United States Attorneys' Offices. In some instances, the President of a different party has allowed some of his predecessor's appointees to remain, as happened in New York, with the support of Senator Daniel Patrick Moynihan, when Jimmy Carter was elected President.

- If United States Attorneys are replaced during an Administration without apparent good cause, the wrong message can be sent to other United States Attorneys. We want our United States Attorneys to be strong and independent in carrying out their jobs and the priorities of the Department. We want them to speak up on matters of policy, to be appropriately aggressive in investigating and prosecuting crimes of all kinds and wisely use their limited resources to address the priorities of their particular district. The United States Attorneys are generally closest to the problems and needs of their districts and thus use their discretion and judgment as to how best to apply national initiatives and priorities. One size seldom fits all. There isn't one right answer or rigid plan that can be applied to achieve optimal justice in each district. The federal system has historically counted on the independence and good judgment of the United States Attorneys to carry out the Department's mission, tailored to the specific circumstances of their districts.

- In my opinion, the United States Attorneys have historically served this country with great distinction. Once in office, they become impartial public servants doing their best to achieve justice without fear or favor. As Justice Sutherland said in *Berger v. United States*: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law. . . ."[1] I am certain that the Department of Justice would not want to act in such a way or have its actions perceived in such a way to derogate from this model of the non-political pursuit of justice by those selected in an open and transparent manner.

- Finally, as to the issue of the optimal appointment mechanism for Interim United States Attorneys, I defer to Congress and the constitutional scholars to find the right answer. For what it is worth, as a practical matter, I believe that the Department of Justice, in the first instance, is ordinarily in the best position to select an appropriate Interim United States Attorney who will ensure the least disruption of the business of the United States Attorney's Office until a permanent successor can be selected and confirmed. I can, however, also appreciate the concern with permitting such appointments to be made for an indefinite period of time without the necessity of Senate confirmation. I personally thought the structure of allowing the Attorney General to appoint Interim United States Attorneys for a period of 120 days and then giving that power to the chief judge of the district generally worked well and achieved an appropriate balance.

Thank you for giving me the opportunity to share my perspective with the Committee. I would be happy to answer any questions.

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[1] USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. 109-177, §502, 120 Stat. 192, 246-47 (2006); 28 U.S.C. § 546 (2006).

[2] 28 U.S.C. §§ 519 & 521-50 (2006); *Nadler v. Mann*, 951 F.2d 301, 305 (11th Cir. 1992); United States Attorneys Mission Statement ("Each United States Attorney exercises wide discretion in the use of his/her resources to further the priorities of the local jurisdiction and needs of their communities. United States Attorneys have been delegated full authority and control in the areas of personnel management, financial

management, and procurement."), http://www.usdoj.gov/usao/index.html (last visited Feb. 4, 2007); U.S. Attys' Manual § 3-2.100 ("the United States Attorney serves as the chief law enforcement officer in each judicial district. . . ."); U.S. Attys' Manual § 3-2.140 ("They are the principal federal law enforcement officers in their judicial districts."), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title3/2musa.htm#3-2.100 (last visited Feb 4, 2007).

[3] Robert H. Jackson, *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), reprinted in 24 *J. Am. Judicature Soc'y* 18, 19 (1940); *also available at* http://www.roberthjackson.org/Man/theman2-7-6-1/ (last visited Feb. 4, 2007).

[4] 295 U.S. 78, 88 (1935).